00029967

BOMBAY BRANCH
OF THE
ROYAL ASIATIC SOCIETY.
TOWN HALL, BOMBAY.

Digitized with financial assistance from the
Government of Maharashtra
on 18 July, 2018

SUPPLEMENTAL NOTES

TO THE

VIEW

OF

THE STATE OF EUROPE

DURING

THE MIDDLE AGES.

29967

BY

HENRY HALLAM.

LONDON:
JOHN MURRAY, ALBEMARLE STREET.
1848.

940.1
Hal/Sup
29967

LONDON:
SPOTTISWOODE and SHAW,
New-street-Square.

CONTENTS.

Page		Edit. 1826.	Edit. 1841.
ix.	PREFACE.		
	NOTES.		
1.	Armoricans	Vol. i. 2.	Vol. i. 2.
3.	Origin of Franks	2.	2.
4.	Testimony of Agathias	3.	2.
5.	Theory of Dubos	3.	2.
11.	Tolerance of Visigoths	4.	3.
11.	Kingdom of Mans	4.	3.
12.	Partitions of the Frank Kingdom	5.	4.
13.	Moral Character of the Merovingian Period	6.	4.
15.	Brunehaut	6.	4.
16.	Mayors of the Palace	7.	5.
18.	Aquitaine	7.	5.
20.	Austrasian Ascendancy	7.	5.
21.	Merovingian Kings	8.	6.
24.	Battle of Poitiers	8.	6.
24.	Saxon Wars	13.	9.
26.	Charlemagne Emperor	14.	10.
28.	Character of Charlemagne	17.	12.
29.	Succession of Louis	18.	13.
32.	Treaty of Verdun	21.	14.
33.	Decline of Carlovingians	23.	15.
42.	Feudal Nobles	23.	15.
42.	Saracens	24.	16.
42.	Norman Incursions	28.	19.
45.	First Kings of the Third Race	31.	21.
47.	Louis VI.	32.	21.
47.	Albigensian War	38.	26.
48.	Knights Templars	61.	41.
53.	John I.	63.	42.
53.	Robert of Artois	65.	44.
54.	Regency	68.	45.
54.	Flanders	73.	50.
55.	Archers	75.	51.

Page	Notes.	Edit. 1826.	Edit. 1841.
55.	The Pestilence	78.	53.
56.	Minority of Charles VI.	95.	65.
56.	Isabel of Bavaria	95.	65.
57.	Louis of Orleans	96.	66.
58.	Philip le Bon	104.	70.
58.	Joan of Arc	110.	75.
59.	Agnes Sorel	112.	76.
60.	Character of Louis XI.	120.	81.
60.	League of the Public Weal	120.	82.
61.	Duke of Guienne	123.	83.
61.	Ambition of Charles	126.	86.
62.	Parliament of Paris	134.	90.
62.	Britany	136.	92.
62.	Marriage of Charles VIII.	138.	94.
63.	Artois and Franche-Comté	139.	94.
63.	Dauphiné	139.	94.
63.	History of France by Velly, Villaret, and Garnier	140.	95
64.	Ancient Germany	143.	99.
67.	Partition of Lands	144.	97.
71.	Alodial Lands	144.	97.
72.	Salic Laws	145.	98.
74.	Salic Lands	146.	98.
75.	Bishops	147.	99.
76.	State of former Inhabitants	148.	100.
91.	Personal Laws	148.	101.
96.	Graf	150.	101.
97.	Hereditary Offices	151. & 166.	102. & 112.
99.	Patrician	151.	101.
99.	Hereditary Succession	152.	103.
100.	Royal Authority	155.	105.
109.	Nobility	158.	106.
113.	Nobility among Anglo-Saxons	159.	107.
113.	Hereditary Benefices	164.	110.
116.	The Word Feudum	165.	111.
118.	Commendation	171.	116.
122.	Reliefs	183.	121.
122.	Guardianship in Chivalry	190.	128.
122.	Princes in the Empire	194.	131.
123.	Analogies to Feudal System	200.	138.
125.	Nobility	205.	138.

Page	Notes.	Edit. 1826.	Edit. 1846.
126.	Surnames	205.	138.
125.	Feudal Aristocracy	209.	139.
128.	Vavassors in England	211.	142.
129.	Freemen	215.	145.
131.	Tributarii, Lidi, Coloni	216.	145.
133.	Servitude	218.	146.
140.	Division of the Pound	235.	157.
140.	National Assemblies	239.	160.
143.	Quotation from Hincmar	240.	161.
146.	Scabini elected by Alodial Proprietors	241.	161.
147.	Hereditary Succession	242.	162.
147.	Dampierre	248.	166.
148.	Beaumanoir	250.	168.
148.	Philip the Fair	252.	169.
149.	States of 1356	260.	174.
149.	Journal of the States of Tours	271.	182.
149.	Charter of Dagobert	273.	183.
150.	Establishments of St. Louis	281.	188.
150.	Royal Court	286.	191.
152.	Municipal Institutions	297.	200.
167.	Compagnies d'Ordonnance	317.	202.
168.	Berenger	327.	220.
168.	Venetian Nobles excluded from Trade	483.	323.
169.	Fall of Venice	485.	325.
169.	Revenues of Venice	489.	327.
170.	Statistical Estimates	533.	356.
171.	Count Julian	Vol. ii. 3.	369.
175.	Suzerainty of Germany over France	91.	428.
175.	Partition of great Fiefs	125.	446.
176.	Character of Frederic III.	124.	450.
178.	Genuineness of the Koran	163.	475.
179.	Anglo-Saxon Church	204.	502.
180.	Parochial Ministers	205.	503.
180.	Grant of Ethelwolf	207.	505.
182.	Spoliation of the Church	209.	505.
182.	Wealth of English Clergy	209.	506.
183.	Capitulary of Charlemagne	211.	508.
183.	Ecclesiastical Policy of Charlemagne	219.	513.
184.	Deposition of Louis	220.	514.

Page	Notes.	Edit. 1826.	Edit. 1841.
185.	Edwy and Elgiva	224.	516.
187.	Early Papal Authority	225.	516.
189.	Concession of Phocas	231.	520.
190.	Wilfrid	232.	521.
190.	Exemption of Monasteries	238.	526.
191.	Marriage of Clergy in early Church	250.	533.
192.	Efforts to maintain Clerical Matrimony	252.	534.
194.	Concordat of Worms	268.	544.
195.	Decretum of Gratian	286.	Vol. ii. 2.
196.	Pragmatic Sanction of Louis IX.	302.	13.
197.	Ecclesiastical Immunity	312.	20.
197.	Benefit of Clergy	318.	23.
198.	Gallican Church	348.	43.
198.	Conclusion of the Chapter	373.	55.
199.	Bretwaldas	376.	61.
204.	Anglo-Saxon Monarchy	378.	61.
206.	Eorls and Ceorls	383.	65.
221.	Expulsion of Britons	386.	68.
224.	Remains of Welsh in English Language	387.	68.
225.	The Witenagemot	388.	69.
230.	Borough Magistrates in the Witenagemot	389.	69.
231.	Division of Counties	390.	70.
232.	Earl in the County-Court	392.	72.
232.	Hundred Court	392.	72.
236.	King's Court before the Conquest	396.	74.
241.	Trial by Jury	401.	78.
263.	Frank Pledge	408.	78.
264.	Bocland and Folcland	409.	83.
268.	Anglo-Saxon Use of the Word Vassallus	413.	86.
268.	Territorial Jurisdiction	417.	88.
269.	Feudal Tenures	418.	89.
271.	Army of William	420.	91.
272.	Risings of the English	422.	92.
273.	Gregory VII. in the papal Chair	423.	92.
274.	Rejection of the English Language	423.	92.
275.	Domesday Book	425.	94.
278.	Forest Law	426.	97.
279.	Oath of Fealty	430.	97.
279.	Jurisdiction of Feudal Courts	434.	100.
280.	Legislative Power in Anglo-Norman Reigns	442.	105.

Page	Notes.	Edit. 1826.	Edit. 1841.
286.	Charter of William I. - - - -	443.	105.
289.	Laws of William I. - - - -	443.	106.
290.	Henry I. - - - - -	443.	106.
291.	Thieves hanged at Leicester - - -	444.	106.
291.	Intermixture of Normans and English -	444.	106.
293.	Vel per Legem Terræ - - -	449.	109.
294.	Omission in the Charters of Henry III. -	453.	112.
294.	Bracton - - - - -	460.	116.
295.	Curia Regis - - - - -	462.	118
300.	Justices of Assise - - - -	463.	119.
301.	Hereditary Succession of Kings - -	472.	125.
304.	Private War - - - -	480.	130.
305.	Etymology of Socage - - -	481.	131.
306.	Confirmatio Chartarum - -	Vol. iii. 5.	138.
306.	Constitution of Parliament in Norman Reigns	15.	143.
316.	Delegates summoned by William I. - -	19.	146.
317.	Writs of the Fourth and Ninth Years of Henry III.	20.	147.
318.	Writ in the Thirty-Eighth Year of Henry III.	21.	147.
319.	Statute of the Twelfth of Richard II. c. 12. -	25.	150.
319.	Electors of Knights - - - -	29.	152.
323.	Towns before the Conquest - - -	31.	154.
327.	Charter of Henry I. to London - -	33.	155.
328.	London - - - - - -	37.	158.
329.	Population of London - - -	38.	158.
331.	Statute of Acton Burnell - - -	46.	164.
332.	Parliaments of Edward I. - - -	46.	164.
335.	Borough Representation - - -	49.	167.
339.	Annual Parliaments - - - -	57.	171.
340.	Lords Ordainers in 1309 - - -	61.	173.
341.	Parliaments of Edward II. - - -	62.	173.
343.	Tallages on King's Demesnes - -	63.	175.
344.	Council of the Twenty-seventh Year of Edward III.	74.	182.
344.	Repeal of the 15th of Edward III. - -	77.	184.
345.	Electors in Boroughs - - -	174.	248.
346.	Peerage by Barony - - - -	181.	252.
353.	Peerages by Writ - - - -	187.	257.
354.	Bannerets - - - - -	188.	257.
355.	Council of Advice - - - -	206.	269
355.	Court of Chancery - - - -	211.	272.

Page	Notes.	Edit. 1826.	Edit. 1841.
364.	Prosperity under the House of Lancaster -	216.	276.
365.	Articles agreed on in the Eighth Year of Henry VI.	216.	276.
366.	King's Ordinary Council - - -	217.	276.
375.	Prerogative of English Kings - - -	226.	282.
378.	Popular Poetry - - - -	244.	297.
381.	Villenage - - - - -	254.	301.
383.	Villeins regardant and in gross - -	256.	302.
386.	Battle of St. Albans - - -	285.	321.
387.	Avitus - - - - -	325.	348.
388.	Could Charlemagne write? - - -	330.	351.
389.	The Dark Ages - - - -	331.	352.
395.	Scotus or Erigena - - - -	335.	355.
396.	Libraries in the Dark Ages - - -	337.	356.
397.	Ordeals - - - - -	341.	359.
397.	Religion of the Middle Ages - - -	350.	365.
398.	Eligius - - - - -	354.	367.
399.	Amalfi - - - - -	390.	391.
399.	Usury - - - - -	406.	402.
400.	Domestic Architecture - - -	423.	413.
403.	Jacques Cœur - - - -	423.	413.
403.	Chimneys - - - - -	425.	414.
404.	Cologne Cathedral - - - -	434.	420.
405.	Agriculture of the Monks - - -	436.	422.
406.	Value of Money - - - -	450.	429.
407.	Wages of Labour - - - -	456.	433.
408.	Waldenses and Albigenses - - -	472.	444.
408.	Versions of Scripture - - -	474.	447.
409.	Chivalry - - - - -	511.	472.
411.	Civil Law - - - - -	520.	477.
411.	Education before Charlemagne - -	520.	478.
412.	Abelard - - - - -	523.	479.
412.	Oxford - - - - -	524.	480.
413.	Schoolmen - - - - -	534.	486.
413.	French Language - - - -	546.	496.
414.	Poetry of Richard I. - - - -	549.	497.
414.	Stories of Arthur - - - -	550.	497.
415.	Petrarch. - - - - -	571.	511.
415.	Layamon - - - - -	571.	512.
415.	English in Parliamentary Proceedings -	575.	514.
417.	Quotations in Dark Ages - - -	578.	516.

PREFACE.

THIRTY years have elapsed since the publication of the Work to which the following Notes relate, and almost forty since the first chapter and part of the second were written. The occupations of that time rendered it impossible for me to bestow such undivided attention as so laborious and difficult an undertaking demanded; and at the outset I had very little intention of prosecuting my researches, even to that degree of exactness which a growing interest in the ascertainment of precise truth, and a sense of its difficulty, led me afterwards in some parts to seek, though nowhere equal to what with a fuller command of time, I should have desired to attain. A measure of public approbation accorded to me far beyond my hopes, has not blinded my discernment to the deficiencies of my own performance; and as successive editions have been called for, I have continually felt that there was more to correct, or to elucidate, than the insertion of a few foot notes would supply; while I was always reluctant to make such alterations as would leave to the purchasers of former editions a right to complain. From an author whose science is continually progressive, such as chemistry or geology, this is unavoid-

ably expected; but I thought the case not quite the same with a mediæval historian.

In the mean time, however, the long period of the Middle Ages had been investigated by many of my distinguished contemporaries with signal success, and I have been anxious to bring my own volumes nearer to the boundaries of the historic domain, as it has been enlarged within our own age. My object has been, accordingly, to reconsider those portions of the Work which relate to subjects discussed by eminent writers since its publication, to illustrate and enlarge some passages which had been imperfectly or obscurely treated, and to acknowledge with freedom my own errors. It appeared most convenient to adopt a form of publication by which the possessors of any edition may have the advantage of these Supplemental Notes, which will not much affect the value of their copy.

The first two Chapters, on the History of France, and on the Feudal System, have been found to require a good deal of improvement. As a history, indeed, of the briefest kind, the first pages are insufficient for those who have little previous knowledge; and this I have, of course, not been able well to cure. The second Chapter embraces subjects which have peculiarly drawn the attention of Continental writers for the last thirty years. The whole history of France, civil, constitutional and social, has been more philosophically examined, and yet with a more copious erudition, by which philosophy must always be guided, than in any former age. Two writers of high name

have given the world a regular history of that country; one for modern as well as mediæval times, the other for these alone. The great historian of the Italian republics, my guide and companion in that portion of the History of the Middle Ages, published, in 1821, the first volumes of his History of the French; it is well known that this labour of twenty years was very nearly terminated when he was removed from the world. The two histories of Sismondi will, in all likelihood, never be superseded; if in the latter we sometimes miss, and yet we do not always miss, the glowing and vivid pencil, guided by the ardour of youth and the distinct remembrance of scenery, we find no inferiority in justness of thought, in copiousness of narration, and especially in love of virtue and indignation at wrong. It seems, indeed, as if the progress of years had heightened the stern sentiments of republicanism with which he set out, and to which the whole course of his later work must have afforded no gratification, except that of scorn and severity. Measuring not only their actions but characters by a rigid standard, he sometimes demands from the men of past times more than human frailty and ignorance could have given, and his history would leave but a painful impression from the gloominess of the picture, were not this constantly relieved by the peculiar softness and easy grace of his style. It cannot be said that Sismondi is very diligent in probing obscurities, or in weighing evidence; his general views, with which most of his chapters begin, are luminous and valuable to the ordinary reader, but sometimes

sketched too loosely for the critical investigator of history.

Less full than Sismondi in the general details, but seizing particular events or epochs with greater minuteness and accuracy — not emulating his full and flowing periods, but in a style concise, rapid, emphatic, sparkling with new and brilliant analogies — picturesque in description, spirited in sentiment, a poet in all but his fidelity to truth — M. Michelet has placed his own History of France by the side of that of Sismondi. His quotations are more numerous, for Sismondi commonly gives only references, and when interwoven with the text, as they often are, though not quite according to the strict laws of composition, not only bear with them the proof which an historical assertion may fail to command, but exhibit a more vivid picture.

In praising M. Michelet, we are not to forget his defects. His pencil, always spirited, does not always fill the canvas. The consecutive history of France will not be so well learned from his pages as from those of Sismondi; and we should protest against his peculiar bitterness towards England, were it not ridiculous in itself by its frequency and exaggeration.

I turn with more respect to a great name in historical literature; and which is only less great in that sense than it might have been, because it belongs also to the groundwork of all future history—the whole series of events which have been developed on the scene of Europe for twenty years now past.

No envy of faction, no caprice of fortune, can tear from M. Guizot the trophy which time has bestowed, that he, for nearly eight years, past and irrevocable, held in his firm grasp a power so fleeting before, and fell only with the monarchy which he had sustained, in the convulsive throes of his country.

. . . . . "Cras vel atrâ
Nube polum Pater occupato,
Vel sole puro: non tamen irritum,
Quodcunque retro est, efficiet."

It has remained for my distinguished friend to manifest that high attribute of a great man's mind—a constant and unsubdued spirit in adversity, and to turn once more to those tranquil pursuits of earlier days, which bestow a more unmingled enjoyment, and a more unenvied glory, than the favour of kings, or the applause of senates.

The Essais sur l'Histoire de France, by M. Guizot, appeared in 1820; the Collection de Mémoires relatives à l'Histoire de France (a translation generally from the Latin, under his superintendence and with notes by him), if I mistake not, in 1825; the Lectures on the Civilisation of Europe, and on that of France, are of different dates, some of the latter in 1829. These form, by the confession of all, a sort of epoch in mediæval history by their philosophical acuteness, the judicious choice of their subjects, and the general solidity and truth of the views which they present.

I am almost unwilling to mention several other

eminent names, lest it should seem invidious to omit any. It will sufficiently appear by these Notes to whom I have been most indebted. Yet the writings of Thierry, Fauriel, Raynouard, and not less valuable, though in time almost the latest, Lehuerou, ought not to be passed in silence. I shall not attempt to characterise these eminent men; but the gratitude of every inquirer into the mediæval history of France is especially due to the ministry of Public Instruction under the late government, for the numerous volumes of Documens Inédits, illustrating that history, which have appeared under its superintendence and at the public expense, within the last twelve years. It is difficult not to feel, at the present juncture, the greatest apprehension that this valuable publication will at least be suspended.

Several Chapters which follow the second in my volumes, have furnished no great store of additions; but that which relates to the English Constitution has appeared to require more illustration. Many subjects of no trifling importance in the history of our ancient institutions, had drawn the attention of men very conversant with its best sources; and it was naturally my desire to impart in some measure the substance of their researches to my readers. In not many instances have I seen ground for materially altering my own views; and I have not of course hesitated to differ from those whom I often quote with much respect. The publications of the Record Commission; the celebrated Report of the Lords' Committee on the Dignity of a Peer; the work of

my learned and gifted friend Sir Francis Palgrave, On the Rise and Progress of the English Commonwealth, replete with omnifarious reading and fearless spirit, though not always commanding the assent of more sceptical tempers; the approved and valuable contributions to constitutional learning by Allen, Kemble, Spence, Starkie, Nicolas, Wright, and many others; are full of important facts and enlightened theories. Yet I fear that I shall be found to have overlooked much, especially in that periodical literature which is too apt to escape our observation or our memory; and can only hope that these Notes, imperfect as they must be, will serve to extend the knowledge of my readers, and guide them to the sources of historic truth. They claim only to be supplemental, and can be of no service to those who do not already possess the History of the Middle Ages.

The paging of the editions of 1826 and 1841, one in three volumes, the other in two, has been marked for each Note; which will prevent, I hope, all inconvenience in reference.

June, 1848.

ERRATA.

Page 1. line 1. for "Zozimus" read "Zosimus."
64. line 3. from bottom of text, for "annuo" read "annua."
111. line 3. from bottom of text, for "mundebunde" read "mundeburde."
206. line 10. for "faventi" read "favente."
281. line 7. from bottom, for "prerogatives" read "prerogative."
326. line 18. from bottom, for "laws" read "lords."

VIEW

OF

THE STATE OF EUROPE

DURING THE MIDDLE AGES.

SUPPLEMENTAL NOTES.

CHAPTER I.

1.

ARMORICANS.

Edit. 1826, p. 2. note *. Edit. 1841, p. 2.

THE evidence of Zozimus, which is the basis of this theory of Dubos, cannot be called very slight, though perhaps inaccurate. Early in the fifth century, according to him, about the time when Constantine usurped the throne of Britain and Gaul, or, as the sense shows, a little later, in consequence of the incursions of the barbarians from beyond the Rhine, the natives of Britain, taking up arms for themselves, rescued their cities from these barbarians; and the whole Armorican territory, and other provinces of Gaul, ὁ Ἀρμόριχος ἅπας, καὶ ἕτεραι Γαλατῶν ἐπαρχίαι, in imitation of the Britons, liberated themselves in the same manner, expelling the Roman rulers, and establishing an internal government: ἐκβάλλουσαι μὲν τοὺς Ῥωμαίους ἄρχοντας, οἰκεῖον δὲ κατ' ἐξουσίαν πολίτευμα καθιστᾶσαι. Lib. vi., apud Rec. des Historiens, vol. i. p. 586. Guizot gives so much authority to this, as to say of the Armoricans: "Ils se

maintinrent toujours libres entre les barbares et les Romains." .Introduction à la Collection des Mémoires, vol. i. p. 336. Sismondi pays little regard to it. The proofs alleged by Daru for the existence of a king of Britany named Conan, early in the fifth century, would throw much doubt on the Armorican republic; but they seem to me rather weak. Britany, it may be observed by the way, was never subject to the Merovingian kings, except sometimes in name. Dubos does not think it probable that there was any central authority in what he calls the Armorican confederacy, but conceives the cities to have acted as independent states during the greater part of the fifth century. (Hist. de l'E'tablissement, &c., vol. i. p. 338.) He gives, however, an enormous extent to Armorica, supposing it to have comprised Aquitaine. But though the contrary has been proved, it is to be observed that Zozimus mentions other provinces of Gaul, ἕτεραι Γαλατῶν ἐπάρχιαι, as well as Armorica. Procopius, by the word Ἀρβόρυχοι, seems to indicate all the inhabitants at least of Northern Gaul; but the passage is so ambiguous, and his acquaintance with that history so questionable, that little can be inferred from it with any confidence. On the whole, the history of Northern Gaul in the fifth century is extremely obscure, and the trustworthy evidence very scanty.

Sismondi (Hist. des Français, vol. i. p. 134.) has a good passage, which it will be desirable to keep in mind when we launch into medieval antiquities: — "Ce peu des mots a donné matière à d'amples commentaires, et au développement de beaucoup de conjectures ingénieuses. L'abbé Dubos, en expliquant le silence des historiens, a fondé sur des sous-entendus une histoire assez complète de la république Armorique. Nous serons souvent appelés à nous tenir en garde contre le zèle des écrivains qui ne satisfait point l'aridité de nos chroniques, et qui y suppléent par des divinations. Plus d'une fois le lecteur pourra être surpris en voyant à combien peu se réduit ce que nous savons réellement sur un évènement assez célèbre pour avoir motivé de gros livres."

2.

ORIGIN OF FRANKS.

Edit. 1326, p. 2, note†. Edit. 1841, p. 2.

THE Franks are not among the German tribes mentioned by Tacitus, nor do they appear in history before the year 240. Guizot accedes to the opinion that they were a confederation of the tribes situated between the Rhine, the Weser, and the Main; as the Alemanni were a similar league to the south of the last river.* Their origin may be derived from the necessity of defending their independence against Rome: but they had become the aggressors in the period when we read of them in Roman history; and, like other barbarians in that age, were often the purchased allies of the declining empire. Their history is briefly sketched by Guizot (Essais sur l'Histoire de France," p. 53.), and more copiously by other antiquarians, among whom M. Lehuerou, the latest and not the least original or ingenious, conceives them to have been a race of exiles or outlaws from other German tribes, taking the name Franc from *frech*, fierce or bold†, and settling at first, by necessity, near the mouth of the Elbe, whence they moved onwards to seek better habitations at the expense of less intrepid, though more civilised, nations. "Et ainsi naquit la première nation de l'Europe moderne."‡ Institutions Merovingiennes, vol. i. p. 91.

An earlier writer considers the Franks as a branch of the great stock of the Suevi, mentioned by Tacitus, who, he tells us, "majorem Germaniæ partem obtinent, propriis adhuc nationibus nominibusquè discreti, quanquam in communi Suevi dicuntur. Insigne gentis obliquare crinem, nodoque substringere." De Moribus German. c. 38. Ammianus mentions the Salian Franks by name: "Francos

* Alemanni is generally supposed to mean "all men." Meyer, however, takes it for another form of Arimanni, from Heermanner, soldiers.—Nouveaux Mémoires de l'Académie de Bruxelles, vol. iii. p. 439.

† This etymology had been given by Thierry, or was of older origin.

‡ As M. Lehuerou belongs to what is called the *Roman* school of French antiquaries, he should not have brought the *nation* from beyond the Rhine.

eos quos consuetudo Salios appellavit." See a memoir in the Transactions of the Academy of Brussels, 1824, by M. Devez, "sur l'établissement des Francs dans la Belgique."

In the great battle of Châlons, the Franks fought on the Roman side against Attila; and we find them mentioned several times in the history of Northern Gaul from that time. Lehuerou (Institutions Merovingiennes, c. 11.) endeavours to prove, as Dubos had done, that they were settled in Gaul, far beyond Tournay and Cambray, under Meroveus and Childeric, though as subjects of the empire; and Luden conjectures that the whole country between the Moselle and the Somme had fallen into their hands even as early as the reign of Honorius. (Geschichte des Deutschen Volkes, vol. ii. p. 381.) This is one of the obscure and debated points in early French history. But the seat of the monarchy appears clearly to have been established at Cambray before the middle of the fifth century.

3.

TESTIMONY OF AGATHIAS.

Edit. 1826, p. 3. note *. Edit. 1841, p. 2. note †.

IT is but fair to quote the entire testimony of Agathias to the civilised manners of the Franks, as it makes, to a certain extent, in favour of a theory to which I do not wholly assent. Πολιτείᾳ ὡς τὰ πολλὰ χρῶνται Ῥωμαϊκῇ, καὶ νόμοις τοῖς αὐτοῖς, καὶ τὰ ἄλλα ὁμοίως ἀμφί τε τὰ συμβόλαια καὶ γάμους καὶ τὴν τοῦ θείου θεράπειαν νομίζουσι .... ἐμοί γε δοκοῦσι σφόδρα εἶναι κόσμιοί τε καὶ ἀστειότατοι, οὐδέν τε ἔχειν τὸ διάλλαττον, ἢ μόνον τὸ βαρβάρικον τῆς στολῆς, καὶ τὸ τῆς φωνῆς ἰδιάζον. The history of Agathias comes down to A. D. 559. At this time many of the savage murders, and other crimes which fill the pages of Gregory of Tours, a writer somewhat more likely to know the truth than a Byzantine rhetorician, had taken place.

4.

THEORY OF DUBOS.

Edit. 1826, p. 3. note*. Edit. 1841, p. 2. note†.

This theory, which is partly countenanced by Gibbon, has lately been revived, in almost its fullest extent, by a learned and spirited investigator of early history, Sir Francis Palgrave, in his Rise and Progress of the English Commonwealth, i. 360.; and it seems much in favour with M. Raynouard, in his Histoire du Droit Municipal en France. M. Lehuerou, in a late work (Histoire des Institutions Merovingiennes et Carolingiennes, 2 vols. 1843), has in a great measure adopted it. Nous croyons devoir déclarer que, dans notre opinion, le livre de Dubos, malgré les erreurs trop réelles qui le déparent, et l'esprit de système qui en a considérablement exagéré les conséquences, est, de tous ceux qui ont abordé le même problème au xviii^me^ siècle, celui où la question des origines Merovingiennes se trouve le plus près de la véritable solution. Cet aveu nous dispense de détailler plus longuement les obligations que nous lui avons. Elles se révèleront d'ailleurs suffisamment d'elles-mêmes. Introduction, p. xi. M. Lehuerou does not, however, follow his celebrated guide so far as to overlook the necessary connexion between barbarian force and its aggressive character. The final establishment of the Franks in Gaul, according to him, rested partly on the concession and consent of the emperors, who had invited them to their service, and rewarded them, as he conceives, with lands, while the progenitors of Clovis bore the royal name, partly on their own encroachments, and especially on the victory of that prince over Syagrius in 486. (Vol. i. p. 228.)

It may be alleged against Dubos, that Clovis advanced into the heart of Gaul as an invader; that he defeated in battle the lieutenant of the emperor, if Syagrius were such; or, if we chose to consider him as independent, which probably in terms he was not, that the emperors of Constantinople could merely have relinquished their authority, because they had not the strength to enforce it. Gaul,

like Britain, in that age, had become almost a sort of derelict possession, to be seized by the occupant; but the title of occupancy is not that of succession. It may be true that the Roman subjects of Clovis paid him a ready allegiance; yet still they had no alternative but to obey.

Twenty-five years elapsed, during which the kingdom of the Salian Franks was prodigiously aggrandised by the submission of all Northern Gaul, by the reduction of the Alemanni on the right bank of the Rhine, and by the overthrow of the Visigoths at Vouglé, which brought almost the whole of the south into subjection to Clovis. It is not disputed by any one that he reigned and conquered in his own right. No one has alleged that he founded his great dominion on any other title than that of the sword, which his Frank people alone enabled him to sustain. But about two years before his death, as Gregory of Tours relates, the emperor Anastasius bestowed upon him the dignity of consul; and this has been eagerly caught at by the school of Dubos, as a fact of high importance, and as establishing a positive right of sovereignty, at least over the Romans, that is, the provincial inhabitants of Gaul, which descended to the long line of the Merovingian house. Sir Francis Palgrave, indeed, more strongly than Dubos himself, seems to consider the French monarchy as deriving its pedigree from Rome, rather than the Elbe; as having come in, to speak our legal language, by a good title, or at least having one cast upon it by *remitter*, after the famous consular honours of Clovis, where most have seen nothing but a gigantic *disseisin*.

The first question that must naturally arise is as to the value assignable to the evidence of Gregory of Tours respecting the gift of Anastasius. Some might hesitate, at least, to accept the story in all its circumstances. Gregory is neither a contemporary, nor, in such a point, an altogether trustworthy witness. His style is verbose and rhetorical; and even in matters of positive history, scanty as are our means of refuting him, he has sometimes exposed his ignorance, and more often given a tone of improbability to his narrative. An instance of the former

occurs in his third book, respecting the death of the widow of Theodoric, contradicted by known history; and for the latter we may refer to the language he puts into the mouth of Clotilda, who urges her husband to abandon the worship of Mars and Mercury, divinities of whom he had never heard.

The main fact, however, that Anastasius conferred the dignity of consul upon Clovis, cannot be rejected. Although it has been alleged that his name does not occur in the Consular Fasti, this seems of no great importance, since the title was merely an honorary distinction, not connecting him with the empire as its subject. Guizot, indeed, and Sismondi conceive that he was only invested with the consular robe, according to what they take to have been the usage of the Byzantine court. But Gregory, by the words *codicillos de consulatu*, seems to imply a formal grant. Nor does the fact rest solely on his evidence, though his residence at Tours would put him in possession of the local tradition. Hincmar, the famous bishop of Rheims, has left a life of St. Remy, by whom Clovis was baptised; and, though he wrote in the ninth century, he had seen extracts from a contemporary life of that saint, not then entirely extant, which life may reasonably be thought to have furnished the substance of the second book of Gregory's history. We find in Hincmar the language of Gregory on the consulship of Clovis, with a little difference of expression: "Cum quibus codicillis etiam illi Anastasius coronam auream cum gemmis, et tunicam blateam misit, et ab eâ die consul et Augustus est appellatus." Rec. des Hist. vol. iii. p. 379. Now the words of Gregory are the following: "Igitur ab Anastasio imperatore codicillos de consulatu accepit, et in basilica beati Martini tunica blatea indutus est et clamyde, imponens vertici diadema. Tunc ascenso equite, aurum argentumque in itinere illo, quod inter portam atrii basilicæ beati Martini et ecclesiam civitatis est, præsentibus populis manu propria spargens, voluntate benignissima erogavit, et ab ea die tanquam consul aut Augustus est vocitatus." The minuteness of local description implies the tradition of the city of

Tours, which Gregory would of course know, and renders all scepticism as to the main story very unreasonable. Thus, if we suppose the Life of St. Remy to have been the original authority, Anastasius will have sent a crown to Clovis. And this would explain the words of Gregory, "imponens vertici diadema." Such an addition to the dignity of consul is, doubtless, remarkable, and might of itself lead us to infer that the latter was not meant in its usual sense. This passage is in other respects more precise than in Gregory; it has not the indefinite and almost unintelligible words *tanquam* consul, and has *et* instead of *aut* Augustus; which latter conjunction, however, in low Latin, is often put for the former.

But, though the historical evidence is considerably strengthened by the supposition that Gregory copied a Life of St. Remigius of nearly contemporary date with the event, we do not find all our difficulty removed so as to render it implicit credence in every particular. That Clovis would be called consul by the provincial Romans, after he had received the title from Anastasius, is very natural; that he was ever called, even by them, Augustus, that is, emperor, except perhaps in a momentary acclamation, we may not unreasonably scruple to believe. The imperial title would hardly be assumed by one who pretended only to a local sovereignty; nor is such a usurpation consistent with the theory, that the Frank chieftain was on terms of friendship with the court of Constantinople, and in subordination to it. One or other hypothesis must surely be rejected. If Clovis was called emperor (and when did Augustus bear any other meaning?), he was no vicegerent of Anastasius, no consul of the empire. But the most material observations that arise are: first, that the dignity of consul was merely personal, and we have not the slightest evidence that any of the posterity of Clovis either acquired or assumed it; secondly, that the Franks alone were the source of power to the house of Meroveus. "The actual and legal authority of Clovis," says Gibbon, "could not receive any new accession from the consular dignity. It was a name, a shadow, an empty

pageant; and, if the conqueror had been instructed to claim the ancient prerogatives of that high office, they must have expired with the period of its annual duration. But the Romans were disposed to revere in the person of their master that antique title which the emperors condescended to assume; the barbarian himself seemed to contract a sacred obligation to respect the majesty of the republic; and the successors of Theodosius, by soliciting his friendship, tacitly forgave and almost ratified the usurpation of Gaul." Chap. xxxviii. It does not appear to me, therefore, very material towards the understanding French history, what was the intention of Anastasius in conferring the name of consul on the king of the Franks. It was a token of amity, no doubt; a pledge, perhaps, that the court of Constantinople renounced the hope of asserting its pretensions to govern a province so irrecoverably separated from it as Gaul: but were it even the absolute cession of a right, which, by the usual law of nations, required something far more explicit, it would not affect in any degree the real authority which Clovis had won by the sword, and had exercised for more than twenty years over the unresisting subjects of the Roman empire.

A different argument for the theory of devolution of power from the Byzantine emperor on the Franks is founded on the cession of Justinian to Theodebert, king of Austrasia, in 540. Provence, which continued in the possession of the emperors for some time after the conquest of Gaul by Clovis, had fallen into the hands of the Ostrogoths, then masters of Italy. The alliance of the Frank king was sought by both parties, at the price of what one enjoyed and the other claimed,—Provence, with its wealthy cities of Marseilles and Arles. Theodebert was no very good ally, either to the Greeks or the Goths; but he occupied the territory, and after a few years it was formally ceded to him by Justinian. "That emperor," in the words of Gibbon, who has not told the history very exactly, "generously yielding to the Franks the sovereignty of the countries beyond the Alps which they already possessed, absolved the provincials from their allegiance, and

established, on a more lawful, though not more solid, foundation, the throne of the Merovingians." Procopius, in his Greek vanity, pretends that the Franks never thought themselves secure of Gaul, until they obtained this sanction from the emperor. "This strong declaration of Procopius," says Gibbon, "would almost suffice to justify the abbé Dubos." I cannot, however, rate the courage of that people so low as to believe that they feared the armies of Justinian, which they had lately put to flight in Italy; nor do I know that a title of sixty years' possession gains much legality by the cession of one who had asserted no claim during that period. Constantinople had tacitly renounced the western provinces of Rome by her inability to maintain them. I must, moreover, express some doubt whether Procopius ever meant to say that Justinian confirmed to the Frank sovereign his rights over the whole of Gaul. He uses, indeed, the word Γαλλίας; but that should, I think, be understood according to the general sense of the passage, which would limit its meaning to Provence, their recent acquisition, and that which the Ostrogoths had already relinquished to them. Gibbon, on the authority of Procopius, goes on to say that the gold coin of the Merovingian kings, "by a singular privilege, which was denied to the Persian monarch, obtained a legal currency in the empire." But this legal currency is not distinctly mentioned by Procopius, though he strangely asserts that it was not lawful, οὐ θεμὶς, for the king of Persia to coin gold with his own effigy, as if the θεμὶς of Constantinople were regarded at Seleucia. There is reason to believe that the Goths, as well as Franks, coined gold, which might possibly circulate in the empire, without having, strictly speaking, a legal currency. The expressions of Agathias, quoted above (Note 3.), that the Franks had nearly the same form of government, and the same laws, as the Romans, may be understood as a mistaken view of what Procopius says in a passage which will be hereafter quoted, and which Agathias, a later writer, perhaps has followed, that the Roman inhabitants of Gaul retained their institutions under the Franks; which was certainly true, though by no means more so than under the Visigoths.

5.

TOLERANCE OF VISIGOTHS.

Edit. 1826, p. 4. Edit. 1841, p. 3.

THE tolerance of the Visigoth sovereigns must not be praised without making an exception for Euric, predecessor of Alaric. He was a prince of some eminent qualities, but so zealous in his religion as to bear hardly on his Catholic subjects. Sidonius Apollinaris loudly complains that no bishoprics were permitted to be filled, that the churches went to ruin, and that Arianism made a great progress. (Fauriel, Hist. de la Gaule Méridionale, vol. i. p. 578.) Under Alaric himself, however, as well as under the earlier kings of the Visigothic dynasty, a more liberal spirit prevailed. Salvian, about the middle of the fifth century, extols the Visigothic government in comparison with that of the empire, whose vices and despotism had met with a deserved termination. Eucherius speaks of the Burgundians in the same manner. (Id. ibid. and vol. ii. p. 28.) Yet it must have been in itself mortifying to live in subjection to barbarians and heretics; not to mention the *hospitality*, as it was called, which the natives were obliged to exercise towards the invaders, by ceding two-thirds of their lands. What, then, must the Western empire have been, when such a condition was comparatively enviable! But it is more than probable that the Gaulish bishops subject to the Visigoths hailed the invasion of the Franks with sanguine hope, and were undoubtedly great gainers by the exchange.

6.

KINGDOM OF MANS.

Edit. 1826, p. 4. note †. Edit. 1841, p. 3. note †.

THE late French writers, as far as I have observed, continue to place a kingdom at Mans. It is certain, nevertheless, that Gregory of Tours, and they have no other

evidence, does not assert this; and his expressions rather lead to the contrary; since, if Regnomeris were king of Mans, why should we not have been informed of it? It is, indeed, impossible to determine such a point negatively from our scanty materials; but if a Frank kingdom had been formed at Mans before the battle of Soissons, this must considerably alter the received notions of the history of Gaul in the fifth century; and it seems difficult to understand how it could have sprung up afterwards during the reign of Clovis.

7.

PARTITIONS OF THE FRANK KINGDOM.

Edit. 1826, p. 5. note †. Edit. 1841, p. 4. note *.

M. FAURIEL endeavours to show the equality of this partition (Hist. de la Gaule Méridionale, vol. ii. p. 92.). But he is obliged to suppose that Germany beyond the Rhine, part of which owned the dominion of Clovis, was counted as nothing, not being inhabited by Franks. It was something, nevertheless, in the scale of power; since from this fertile source the Austrasian kings continually recruited their armies. Aquitaine, that is, the provinces south of the Loire, was divided into three, or rather perhaps two portions. For though Thierry and Childebert had considerable territories, it seems not certain that Clodomir took any share, and improbable that Clotaire had one.

Thierry, therefore, king of Austrasia, may be reckoned the best provided of the brethren. It will be obvious from the map, that the four capitals, Metz, Soissons, Paris, and Orleans are situated at no great distance from each other, relatively to the whole of France. They were, therefore, in the centre of force; and the brothers might have lent assistance to each other, in case of a national revolt.

The cause of this complexity in the partition of France among the sons of Clovis, has been conjectured by Dubos, with whom Sismondi (vol. i. p. 242.) agrees, to have been

their desire of owning as subjects an equal number of Franks. This is supported by a passage in Agathias, quoted by the former, Hist. de l'Etablissement, vol. ii. p. 413. Others have fancied that Aquitaine was reckoned too delicious a morsel to be enjoyed by only one brother. In the second great partition, that of 567 (for that of 561 did not last long), when Sigebert, Gontran, and Chilperic took the kingdoms of Austrasia, Burgundy, and what was afterwards called Neustria, the southern provinces were again equally divided. Thus Marseilles fell to the king of Paris, or Neustria, while Aix and Avignon were in the lot of Burgundy.

8.

MORAL CHARACTER OF THE MEROVINGIAN PERIOD.

Edit. 1826, p. 6. Edit. 1841. p. 4.

IT ought, perhaps, to be observed, that no period of ecclesiastical history, especially in France, has supplied more saints to the Calendar. It is the golden age of hagiology. Thirty French bishops, under Clovis and his sons alone, are venerated in the Roman church; and not less than seventy-one saints, during the same short period, have supplied some historical information, through their lives in Acta Sanctorum. "The foundation of half the French churches," says Sismondi, "dates from that epoch." (Vol. i. p. 308.) Nor was the seventh century much less productive of that harvest. Of the service which the Lives of the Saints have rendered to history, as well as of the incredible deficiences of its ordinary sources, some notion may be gained by the strange fact mentioned in Sismondi, that a king of Austrasia, Dagobert II., was wholly overlooked by historians; and his reign, from 674 to 678, only retrieved by some learned men in the seventeenth century, through the life of our Saint Wilfrid, who had passed through France on his way to Rome. (Hist. des Français, vol. ii. p. 51.) But there is a diploma of this prince in Rec. des Hist. vol. iv. p. 685.

Sismondi is too severe a censurer of the religious sentiment which actuated the men of this period. It did not prevent crimes, even in those, frequently, who were penetrated by it. But we cannot impute to the ascetic superstition of the sixth and seventh centuries, as we may to the persecuting spirit of later ages, that it occasioned them — crimes, at least, which stand forth in history; for to fraud and falsehood it no question lent its aid. The Lives of the Saints, amidst all the mass of falsehood and superstition which incrusts them, bear witness, not only to an intense piety, which no one will dispute, but to much of charity and mercy toward man. But, even if we should often doubt particular facts from slenderness of proof, they are at least such as the compilers of these legends thought praiseworthy, and such as the readers of them would be encouraged to imitate.*

St. Bathilda, of Anglo-Saxon birth, queen of Clovis II., redeeming her countrymen from servitude, to which the barbarous manners of their own people frequently exposed them, is in some measure a set off against the tyrant princes of the family into which she had come. And many other instances of similar virtue are attested with reasonable probability. Sismondi never fully learned to judge men according to a subjective standard, that is, their own notions of right and wrong; or even to perceive the immediate good consequences of many principles, as well as social institutions connected with them, which we would no more willingly tolerate at present than himself. In this respect Guizot has displayed a more philosophical temper. Still there may be some caution necessary not to carry this subjective estimate of human actions too far, lest we lose sight of their intrinsic quality.

We have, unfortunately, to set against the saintly legends an enormous mass of better-attested crimes, especially of oppression and cruelty. Perhaps there is hardly

* M. Ampère has well observed, that it was not the mere interest of the story, nor even the ideal morality, which constituted the principal charm of the legends of saints; it was the constant idea of Providence supporting the faithful in those troublous times, and of saints always interfering in favour of the innocent.—Hist. Litt. de la France avant le 12me siècle, ii. 360.

any history extending over a century, which records so much of this, with so little information of any virtue, any public spirit, any wisdom, as the ten books of Gregory of Tours. The seventh century has no historian equally circumstantial; but the tale of the seventh century is in substance the same. The Roman fraud and perfidy mingled, in baleful confluence, with the ferocity and violence of the Frank.

> "Those wild men's vices they received,
> And gave them back their own."

If the Church was deeply tainted with both these classes of crime, it was at least less so, especially with the latter, than the rest of the nation. A saint might have many faults; but it is strongly to be presumed that mankind did not canonise such monsters as the kings and nobles of whom we read almost exclusively in Gregory of Tours. A late writer, actuated by the hatred of antiquity, and especially of kings, nobles, and priests, which is too much the literary creed of France, has collected from age to age every testimony to the wickedness of the powerful. His proofs are one-sided, and consequently there is some unfairness in the conclusions; but the facts are, for the most part, irresistibly true. Dulaure, Hist. de Paris, passim.

9.

BRUNEHAUT.

Edit. 1826, p. 6. Edit. 1841, p. 4.

BRUNEHAUT was no unimportant personage in this history. She had become hateful to the Austrasian aristocracy by her Gothic blood, and still more by her Roman principles of government. There was evidently a combination to throw off the yoke of civilised tyranny. It was a great conflict, which ended in the virtual dethronement of the house of Clovis. Much, therefore, may have been exaggerated by Fredegarius, a Burgundian by birth, in relating the crimes of Brunehaut. But, unhappily, the

antecedent presumption, in the history of that age, is always on the worse side. She was unquestionably endowed with a masculine energy of mind, and very superior to such a mere imp of audacious wickedness as Fredegonde. Brunehaut left a great, and almost fabulous name; public causeways, towers, castles, in different parts of France, are popularly ascribed to her. It has even been suspected by some that she suggested the appellation of Brunechild in the Nibelungen Lied. That there is no resemblance in the story, or in the character, courage excepted, of the two heroines, cannot be thought an objection.

10.

MAYORS OF THE PALACE.

Edit. 1826, p. 7. Edit. 1841, p. 5.

THE Mayor of the Palace appears as the first officer of the crown in the three Frank kingdoms, during the latter half of the sixth century. He had the command, as Guizot supposes, of the Antrustions, or vassals of the king. Even afterwards the office was not, as this writer believes, properly elective, though in the case of a minority of the king, or upon other special occasions, the *leudes*, or nobles, chose a mayor. The first instance we find of such an election was in 575, when, after the murder of Sigebert by Fredegonde, his son Childebert being an infant, the Austrasian *leudes* chose Gogon for their mayor. There seem, however, so many instances of elective mayors in the seventh century, that, although the royal consent may probably have been legally requisite, it is hard to doubt that the office had fallen into the hands of the nobles. Thus, in 641: Flaochatus, genere Francus, major-domûs in regnum Burgundiæ, electione pontificum et cunctorum ducum a Nantechilde regina in hunc gradum honoris nobiliter stabilitur. (Fredegar, Chron. c. 89.) And on the election of Ebroin: Franci in incertum vacillantes, accepto consilio, Ebruinum in hujus honoris curam ac dignitatem statuunt. (c. 92.)

On the death of Ebroin in 681, Franci Warratonem virum illustrem in locum ejus cum jussione regis majorem-domûs palatio constituunt. These two instances were in Neustria; the aristocratic power was still greater in the other parts of the monarchy.

Sismondi adopts a very different theory, clinging a little too much to the democratic visions of Mably. "If we knew better," he says, "the constitution of the monarchy, perhaps we might find that the Mayor, like the Justiciary of Aragon, was the representative not of the great but of the freemen, and taken generally from the second rank in society, charged to repress the excesses of the aristocracy as well as of the crown." (Hist. des Français, vol. ii. p. 4.) Nothing appears to warrant this vague conjecture, which Guizot wholly rejects, as he does also the derivation of major-domûs from *mord-dohmen*, a verb signifying to sentence to death, which Sismondi brings forward to sustain his fanciful analogy to the Aragonese justiciary.

The hypothesis, indeed, that the Mayor of the palace was chosen out of the common freeholders, and not the highest class, is not only contrary to every thing we read of the aristocratical domination in the Merovingian kingdoms, but to a passage in Fredegarius, to which probably others might be added. Protadius, he informs us, a Mayor of Brunehaut's choice, endeavoured to oppress all men of high birth, that no one might be found capable of holding the charge in his room (c. 27.). This, indeed, was in the sixth century, before any sort of election was known. But, in the seventh, the power of the great, and not of the people, meets us at every turn. Mably himself would have owned that his democracy had then ceased to exercise any power.

The Austrasian mayors of the palace were, from the reign of Clotaire II., men of great power, and taken from the house of Pepin of Landen. They carried forward, ultimately for their own aggrandisement, the aristocratic system which had overturned Brunehaut. Ebroin, on the other hand, in Neustria, must be considered as keeping up the struggle of the royal authority, which he exercised

in the name of several phantoms of kings, against the encroachments of the aristocracy, though he could not resist them with final success. Sismondi (vol. ii. p. 64.) fancies that Ebroin was a leader of the freemen against the nobles. But he finds a democratic party everywhere, and Guizot justly questions the conjecture (Collection des Mémoires, vol. ii. p. 320). Sismondi, in consequence of this hypothesis, favours Ebroin; for whom it may be alleged that we have no account of his character but from his enemies, chiefly the biographer of St. Leger. M. Lehuerou sums up his history with apparent justice: "Ainsi périt, après une administration de vingt ans, un homme remarquable à tous égards, mais que le triomphe de ses ennemis a failli déshériter de sa gloire. Ses violences sont peu douteuses, mais son génie ne l'est pas davantage, et rien ne prouve mieux la terreur qu'il inspirait aux Austrasiens, que les injures qu'ils lui ont prodiguées." (Institutions Carolingiennes, p. 281.)

11.

AQUITAINE.

Edit. 1826, p. 7. note †. Edit. 1841, p. 5. note †.

ARIBERT, or rather Caribert, brother of Dagobert I., was declared king of Aquitaine in 628; but on his death, in 631, it became a duchy dependent on the monarchy under his two sons, with its capital at Toulouse. This dependence, however, appears to have soon ceased in the decay of the Merovingian line; and for a century afterwards, Aquitaine can hardly be considered as part of either the Neustrian or Austrasian kingdom. "L'ancienne population Romaine travaillait sans cesse a ressaisir son indépendance. Les Francs avaient conquis, mais ne possédaient vraiment pas ces contrées. Dès que leurs grandes incursions cessaient, les villes, et les campagnes se soulevaient, et se confédéraient pour secouer le joug." (Guizot, Cours d'Hist. Moderne, ii. 229.) This important fact, though acknowledged in passing by most historians, has been largely

illustrated in the valuable Histoire de la Gaule Méridionale, by M. Fauriel.

Aquitaine, in its fullest extent, extended from the Loire beyond the Garonne, with the exception of Touraine and the Orléannois. The people of Aquitaine, in this large sense of the word, were chiefly Romans, with a few Goths. The Franks, as a conquering nation, had scarcely taken up their abode in those provinces. But undoubtedly the Merovingian kings possessed estates in the south of France, which they liberally bestowed as benefices upon their leaders, so that the chief men were frequently of Frank origin. They threw off, nevertheless, their hereditary attachments, and joined with the mass of their new countrymen in striving for the independence of Aquitaine. After the battle of Testry, which subverted the Neustrian monarchy, Aquitaine, and even Burgundy, ceased for a time to be French; under Charles Martel they were styled the Roman countries. (Michelet, ii. 9.)

Eudon, by some called Eudes, grandson of Caribert, a prince of conspicuous qualities, gained ground upon the Franks during the whole period of Pepin Heristal's power, and united to Aquitaine, not only Provence, but a new conquest from the independent natives, Gascony. Eudon obtained, in 721, a far greater victory over the Saracens than that of Charles Martel at Poitiers. The slaughter was immense, and confessed by the Arabian writers; it even appears that a funeral solemnity, in commemoration of so great a calamity, was observed in Spain for four or five centuries afterwards. (Fauriel, iii. 79.) But in its consequences it was far less important; for the Saracens, some years afterwards, returned to avenge their countrymen, and Eudon had no resource but in the aid of Charles Martel. After the retreat of the enemy, it became the necessary price of the service rendered by the Frank chieftain, that Aquitaine acknowledged his sovereignty. This, however, was still but nominal, till Pepin determined to assert it more seriously, and after a long war, overcame the last of the ducal line sprung from Clotaire II., which had displayed, for almost a century and a half, an energy

in contrast with the imbecility of the elder branch. Even this, as M. Fauriel observes, was little more than a change in the reigning family; the men of Aquitaine never lost their peculiar nationality; they remained a separate people in Gaul, a people distinguished by their character, and by the part which they were called to play in the political revolutions of the age. (Vol. iii. 300.)

12.

AUSTRASIAN ASCENDANCY.

Edit. 1826, p. 7. Edit. 1841, p. 5.

PEPIN HERISTAL was styled Duke of Austrasia, but assumed the mayoralty of Neustria after his great victory at Testry in 687, which humbled for a long time the great rival branch of the monarchy. But he fixed his residence at Cologne, and his family seldom kept their court at Paris. The Franks under Pepin, his son and grandson, "seemed for a second time," says Sismondi, "to have conquered Gaul; it is a new invasion of the language, the military spirit, and the manners of Germany, though only recorded by historians as the victory of the Austrasians over the Neustrians in a civil war. The chiefs of the Carlovingian family called themselves, like their predecessors, kings of the Franks: they appear as legitimate successors of Clovis and his family; yet all is changed in their spirit and their manners." (Vol. ii. p. 170.)

This revival of a truly German spirit in the French monarchy had not been sufficiently indicated by the historians of the eighteenth century. It began with the fall of Brunehaut, which annihilated the scheme, not peculiar to herself, but carried on by her with remarkable steadiness, of establishing a despotism analogous to that of the empire. The Roman policy expired with her; Clotaire II. and Dagobert I. were merely kings of barbarians, exercising what authority they might, but on no settled scheme of absolute power. Their successors were unworthy to

be mentioned; though, in Neustria, through their mayors of the palace, the royal authority may have been apparently better maintained than in the eastern portion of the kingdom. The kingdoms of Austrâsia and Neustria rested on different bases. In the former the Franks were more numerous, less scattered, and, as far as we can perceive, had a more considerable nobility. They had received a less tincture of Roman policy. They were nearer to the mother-country, which had been, as the earth to Antæus, the source of perpetually recruited vigour. Burgundy, a member latterly of the Neustrian monarchy, had also a powerful aristocracy, but not in so great a degree, probably, of Frank, or even barbarian descent. The battle of Testry was the second epoch, as the fall of Brunehaut had been the first, in the restoration of a barbaric supremacy to the kingdom of Clovis; and the benefices granted by Charles Martel were the third. It required the interference of the Holy See, in confirming the throne of the younger Pepin, and still more the splendid qualities of Charlemagne, to keep up, even for a time, the royal authority and the dominion of law. It is highly important to keep in our minds this distinction between Austrasia and Neustria, subsisting for some ages, and, in fact, only replaced, speaking without exact geographical precision, by that of Germany and France.

13.

MEROVINGIAN KINGS.

Edit. 1826, p. 8. Edit. 1841, p. 6.

THE Merovingian period is so briefly touched in the text, as not, I fear, to be very distinctly apprehended by every reader. It may assist the memory to sketch rather a better outline, distributing the period into the following divisions: —

I. The reign of Clovis. — The Frank monarchy is

established in Gaul; the Romans and Visigoths are subdued; Christianity, in its Catholic form, is as entirely recognised as under the empire; the Franks and Romans, without greatly intermingling, preserve in the main their separate institutions.

II. The reigns of his four sons, till the death of Clotaire I., the survivor, in 561. — A period of great aggrandisement to the monarchy. Burgundy and Provence in Gaul itself, Thuringia, Suabia, and Bavaria on the other side of the Rhine, are annexed to their dominions; while every crime digraces the royal line, and in none more than in Clotaire I.

III. A second partition among his four sons ensues: the four kingdoms of Paris, Soissons, Orleans, and Austrasia revive; but a new partition of these is required by the recent conquests, and Gontran of Orleans, without resigning that kingdom, removes his residence to Burgundy. The four kingdoms are reduced to three by the death of Caribert of Paris; one afterwards very celebrated by the name Neustria*, between the Scheldt and the Loire, is formed under Chilperic, comprehending those of Paris and Soissons. Caribert of Paris had taken Aquitaine, which at his death was divided among the three survivors; Austrasia was the portion of Sigebert. This generation was fruitful of still more crimes than the last, redeemed by no golden glory of conquest. Fredegonde, the wife of Chilperic, diffuses a baleful light over this period. But while she tyrannises with little control in the west of France, her rival and sister in crime, Brunehaut, wife of Sigebert and mother of Thierry II. his successor, has to encounter a powerful opposition from the Austrasian aristocracy; and in this part of the monarchy a new feature developes itself; the great proprietors, or nobility, act systematically with a view to restrain the royal power.

* Neustria, or Western France, is first mentioned in a diploma of Childebert, with the date of 558. But the genuineness of this has been denied: the word never occurs in the history of Grégory of Tours, as I find by the index; and M. Lehuerou seems to think that it was not much used till after the death of Brunehaut, in 613.

Brunehaut, after many vicissitudes, and after having seen her two sons on the thrones of Austrasia and Burgundy, falls into the hands of Clotaire II., king of the other division, and is sentenced to a cruel death. Clotaire unites the three Frank kingdoms.

IV. Reigns of Clotaire II. and his son Dagobert I.—The royal power, though shaken by the Austrasian aristocracy, is still effective. Dagobert, a prince who seems to have rather excelled most of his family, and to whose munificence several extant monuments of architecture and the arts are referred, endeavours to stem the current. He was the last of the Merovingians who appears to have possessed any distinctive character; the *Insensati* follow. After the reign of Dagobert, most of the provinces beyond the Loire fall off, as it may be said, from the monarchy, and hardly belong to it for a century.

V. The fifth period begins with the accession of Clovis II., son of Dagobert, in 638, and terminates with Pepin Heristal's victory over the Neustrians at Testry, in 687. It is distinguished by the apparent equality of the two remaining kingdoms, Burgundy having now fallen into that of Neustria, and by the degradation of the royal line, in each alike, into puppets of the mayors of the palace. It is, in Austrasia, the triumph of the aristocracy, among whom the bishops are still more prominent than before. Ebroin holds the mayoralty of Neustria with an unsteady command; but, in Austrasia, the progenitors of Pepin Heristal grow up for two generations in wealth and power, till he becomes the acknowledged chief of that part of the kingdom, bearing the title of duke instead of mayor, and by the battle of Testry puts an end to the independence of Neustria.

VI. From this time the family of Pepin is virtually sovereign in France, though at every vacancy kings of the royal house are placed by them on the throne. Charles Martel, indeed, son of Pepin, is not acknowledged, even in Austrasia, for a short time after his father's death, and Neustria attempts to regain her independence; but he is soon called to power, defeats, like his father, the western

Franks, and becomes, in almost as great a degree as his grandson, the founder of a new monarchy. So completely is he recognised as sovereign, though not with the name of king, that he divides France, as an inheritance, among his three sons. But soon one only, Pepin the Short, by fortune or desert, becomes possessor of this goodly bequest. In 752, the new dynasty acquires a legal name, by the coronation of Pepin.

14.

BATTLE OF POITIERS.

Edit. 1826, p. 8. Edit. 1841, p. 5.

IT is now believed that the slaughter at the battle near Poitiers was by no means immense, and even that the Saracens retired without a decisive action. (Sismondi, ii. 132. Michelet, ii. 13.)

15.

SAXON WARS.

Edit. 1826, p. 13. Edit. 1841, p. 9.

THE true cause, M. Michelet observes (Hist. de France, ii. 39.), of the Saxon wars, which had begun under Charles Martel, and were in some degree defensive on the part of the Franks, was the ancient antipathy of race, enhanced by the growing tendency to civilised habits among the latter. This, indeed, seems sufficient to account for the conflict, without any national antipathy. It was that which makes the Red Indian perceive an enemy in the Anglo-American, and the Australian savage in the Englishman. The Saxons, in their deep forests and scantily cultivated plains, could not bear fixed boundaries of land. Their *gau* was indefinite; the *mansus* was cer-

tain; it annihilated the barbarian's only method of combining liberty with possession of land, — the right of shifting his occupancy.* It is not probable, from subsequent events, that the Saxons held very tenaciously by their religion; but when Christianity first offered itself, it came in the train of a conqueror. Nor could Christianity, according at least to the ecclesiastical system, be made compatible with such a state of society as the German in that age. Hence the Saxons endeavoured to burn the first churches, thus drawing retaliation on their own idols.

The first apostles of Germany were English; and of these the most remarkable was St. Boniface. But this had been in the time of Charles Martel and Pepin. The labours of these missionaries were chiefly in Thuringia, Franconia, and Bavaria, and were rewarded with great success. But we may here consider them only in their results on the Frank monarchy. Those parts of Germany had long been subject to Austrasia, but except so far as they furnished troops, scarcely formed an integrant portion of that kingdom. The subjection of a heathen tribe is totally different from that of a Christian province. With the Church came churches, and for churches there must be towns, and for towns a magistracy, and for magistracy law and the means of enforcing it. How different was the condition of Bavaria or Hesse in the ninth century from that of the same countries in the seventh! Not outlying appendages to the Austrasian monarchy, hardly counted among its subjects; but capable of standing by themselves, as co-ordinate members of the empire, an equipoise to France herself, full of populous towns, wealthy nobles and prelates, better organised and more flourishing states than their neighbours on the left side of the Rhine. Charlemagne founded eight bishoprics in Saxony, and distributed the country into dioceses.

* Michelet refers to Grimm, who is excellent authority. The Saxons are likely to have maintained the old customs of the age of Tacitus, longer than German tribes on the Rhine and Main.

16.

CHARLEMAGNE EMPEROR.

Edit. 1826, p. 14. Edit. 1841, p. 10.

THE project of substituting a Frank for a Byzantine sovereign was by no means new in 800. Gregory II., by a letter to Charles Martel in 741, had offered to renounce his allegiance to the empire, placing Rome under the protection of the French chief, with the title of consul or senator. The immediate government he doubtless meant to keep in the hands of the Holy See. He supplicated, at the same time, for assistance against the Lombards, which was the principal motive for this offer. Charles received the proposal with pleasure, but his death ensued before he had time to take any steps towards fulfilling so glorious a destiny. When Charlemagne acquired the rank of Patrician at Rome in 789, we may consider this as a part performance of Gregory II.'s engagement, and the supreme authority was virtually in the hands of the king of the Franks; but the renunciation of allegiance towards the Greek empire had never positively taken place, and there are said to have been some tokens of recognition of its nominal sovereignty almost to the end of the century.

It is contended by Sir F. Palgrave, that Charlemagne was chosen by the Romans as lawful successor of Constantine V., whom his mother Irene had dethroned in 795, the usage of the empire having never admitted a female sovereign. And for this he quotes two ancient chronicles, one of which, however, appears to have been copied from the other. It is indeed true, which he omits to mention, that Leo III. had a singular scheme of a marriage between Charles and Irene, which would for a time have united the empire. The proposal was actually made, but prudently rejected by the Greek lady.

It remains nevertheless to be shown, by what right Leo III., *cum omni Christiano populo*, that is, the priests

and populace of degenerate Rome, could dispose of the entire empire, or affect to place a stranger on the throne of Constantinople; for if Charles were the successor of Constantine V., we must draw this conclusion. Rome, we should keep in mind, was not a jot more invested with authority than any other city; the Greek capital had long taken her place; and in every revolution of new Rome, the decrepid mother had without hesitation obeyed. Nor does it seem to me exceedingly material, if the case be such, that Charlemagne was not styled emperor of the West, or successor of Augustulus. It is evident that his empire, relatively to that of the Greeks, was western; and we do not find that either he or his family ever claimed an exclusive right to the imperial title. The pretension would have been diametrically opposed both to prescriptive right and actual possession. He wrote to the Emperor Nicephorus, successor of Irene, as *fraternitas vestra;* but it is believed that the Greeks never recognised the title of a western barbarian. In a later age, indeed, some presumed to reckon the emperor of Constantinople among kings. A writer of the fourteenth century says, in French: — "Or devez savoir, qu'il ne doit estre sur terre qu'un seul empereur, combien que celui de Constantinople estime estre seul empereur; mais non est, il n'est fors seulement qu'un roy." (Ducange, voc. Imperator, which is worth consulting.) The kings of France and Castile, as well as our own Anglo-Saxon monarchs in the tenth century, and even those of Bulgaria, sometimes assumed the imperial title. But the Anglo-Saxons preferred that of Basileus, which was also a Byzantine appellation.

The probable design of Charlemagne, in accepting the title of emperor, was not only to extend his power as far as possible in Italy, but to invest it with a sort of sacredness and prescriptive dignity in the eyes of his barbarian subjects. These had been accustomed to hear of emperors as something superior to kings; they were themselves fond of pompous titles, and the chancery of the new Augustus soon borrowed the splendid ceremonial of the

Byzantine court. His councillors approached him on their knees, and kissed his feet. Yet it does not appear from history, that his own royal power, certainly very considerable before, was much enhanced after it became imperial. He still took the advice, and legislated with the consent of his *leudes* and bishops; in fact, he continued to be a German, not a Roman, sovereign. In the reigns of his family, this prevalence of the Teutonic element in the Carlovingian polity became more and more evident; the bishops themselves, barbarian in origin and in manners, cannot be reckoned in the opposite scale.

This was a second failure of the attempt, or at least the scheme, of governing barbarians upon a Roman theory. The first had been tried by the sons of Clovis, and the high-spirited Visigoth, Brunehaut. But the associations of Roman authority with the imperial name were too striking to be lost for ever; they revived again in the twelfth and thirteenth centuries with the civil law, and gained strength with the Ghibelin faction in Italy. Even in France and England, as many think, they were by no means ineffectual; though it was necessary to substitute the abstract principle of royalty for the Lex Regia of the Roman empire.

17.

CHARACTER OF CHARLEMAGNE.

Edit. 1826, p. 17. Edit. 1841, p. 12.

AN exception to the general suffrage of historians in favour of Charlemagne is made by Sismondi. He seems to consider him as having produced no permanent effect; the empire, within half a century, having been dismembered, and relapsing into the merest weakness: — "Tellement la grandeur acquise par les armes est trompeuse, quand elle ne se donne pour appui aucune institution bienfaisante, et tellement le règne d'un grand roi demeure sterile, quand il ne fonde pas la liberté de ses conci-

toyens." (Vol. iii. p. 97.) But certainly, some of Charlemagne's institutions were likely to prove beneficial if they could have beem maintained, such as the Scabini and the Missi Dominici. And when Sismondi hints that Charlemagne ought to have given a *charte constitutionnelle*, it is difficult not to smile at such a proof of his inclination to judge past times by a standard borrowed from the theories of his own. M. Guizot asks, whether the nation was left in the same state in which the emperor found it. Nothing fell with him, he remarks, but the central government, which could only have been preserved by a series of men like himself. (Essais sur l'Hist. de France, pp. 276—294. Hist. de la Civilisation en France, Leçon ii. p. 39.) Some indeed of his institutions cannot be said to have long survived him; but this again must be chiefly attributed to the weakness of his successors. No one man of more than common ability arose in the Carlovingian dynasty after himself; a fact very disadvantageous to the permanence of his policy, and perhaps rather surprising; though it is a theory of Sismondi, that royal families naturally dwindle into imbecility, especially in a semi-barbarous condition of society.

18.

SUCCESSION OF LOUIS.

Edit. 1826, p. 18. Edit. 1841, p. 13.

A QUESTION of the utmost importance had been passed over in the elevation of Charlemagne to the imperial title. It was that of hereditary succession. No allusion, as far as I have found, was made to this in the irregular act by which the pope, with what he called the Roman people, transferred their allegiance from Constantinople to Aix-la-Chapelle. It was indeed certain, that the empire had not only passed for hereditary from the time of Augustus, but ever since that of Diocletian had been partible among the imperial family at the will of the possessor. Yet the

whole proceeding was so novel, and the pretensions of the Holy See implied in it so indefinite, that some might doubt whether Charles had acquired, along with the rank of *imperator*, its ancient prerogatives. There was also a momentous consideration, how far his Frank subjects, accustomed latterly to be consulted on royal succession, with their rights of election, within the limits of the family, positively recognised at the accession of Pepin, and liable to become jealous of Roman theories of government, would acquiesce in a simple devolution of the title on the eldest born as his legal birthright. In the first prospective arrangement, accordingly, which Charles made for the succession, that at Thionville, in 806, a partition among his three sons was designed, with the largest share reserved for the eldest. But though Italy, by which he meant, as he tells us, Lombardy, was given to one of the younger, care is taken by a description of the boundaries, to exclude Rome itself, as well as the whole exarchate of Ravenna, become, by Pepin's donation, the patrimony of St. Peter; nor is there the least allusion to the title of emperor. Are we to believe that he relinquished the eternal city to its bishop, though styling himself, in this very instrument, Romani rector imperii, and having literally gained not another inch of territory by that dignity? It is surely more probable, that he reserved the sovereignty over Rome, to be annexed to the rank of emperor, whenever he should obtain that for his eldest son. And on the death of this son, and of his next brother, some years afterwards, the whole succession devolving on Louis the Debonair, Charlemagne presented this prince to the great Placitum of the nobles and bishops at Aix-la-Chapelle in 813, requesting them to name him king and emperor. No reference was made to the pope for his approbation; and thus the German principle of sovereignty gained a decisive victory over the Roman. If some claim of the pope to intermeddle with the empire was intimated at the coronation of Louis at Rheims by Stephen II. in 816, which does not seem certain, it could only have been through the pope's knowledge of the personal submissiveness to ecclesiastical

power, which was the misfortune of that prince. He had certainly borne the imperial title from his father's death.

In the division projected by Louis in 817, to take place on his death, and approved by an assembly at Aix, a considerable supremacy was reserved for the future emperor; he was constituted, in effect, a sort of suzerain, without whose consent the younger brothers could do nothing important. Thus the integrity of the empire was maintained, which had been lost in the scheme of Charlemagne in 806. But M. Fauriel (vol. iv. p. 83.) reasonably suspects an ecclesiastical influence in suggesting this measure of 817, which was an overt act of the Roman, or imperial, against the barbarian party. If the latter consented to this in 817, it was probably, either because they did not understand it, or because they trusted to setting it aside. And, as is well known, the course of events soon did this for them. "It is indisputable," says Ranke, "that the order of succession to the throne, which Louis the Pious, in utter disregard of the warnings of his faithful adherents, and in opposition to all German modes of thinking, established in the year 817, was principally brought about by the influence of the clergy." (Hist. of Reformation, Mrs. Austin's translation, vol. i. p. 9.) He attributes the concurrence of that order, in the subsequent revolt against Louis, to the endeavours he had made to deviate from the provisions of 819, in favour of his youngest son, Charles the Bald.

19.

NOTE †.

Edit. 1826, p. 19. Edit. 1841, p. 13.

THIS note is not accurate, as has been shown above, so far as it speaks of the conditions of the arrangement in 806 as nearly the same as those of 817.

20.

TREATY OF VERDUN.

Edit. 1826. p. 21. Edit. 1841. p. 14.

THE treaty of Verdun, in 843,—not that of Mersen, in 847,—is, in reality, the epoch of a final separation between the French and German members of the empire. Its millenary was celebrated by some of the latter nation, in 1843.

The partition, which the treaty of Verdun confirmed, had been made by commissioners specially appointed in the preceding year. "Le nombre total des commissaires fut porté à trois cents; ils ce distribuèrent toute la surface de l'empire, qu'ils s'engagèrent à parcourir avant le mois d'août de l'année suivante: cet immense travail étoit en effet alors necessaire pour se procurer les connoissances qu'on obtient aujourd'hui en un instant, par l'inspection d'une carte géographique: malheureusement on écrivoit à cette epoque aussi peu qu'on lisoit. Le rapport des commissaires ne fut point mis par écrit, ou point deposé dans les archives. S'il nous avoit été conservé, ce seroit le plus curieux de tous les monumens sur l'état de l'Europe au moyen âge." (Sismondi, Hist. des Franç. iii. 76.) For this he quotes Nithard, a contemporary historian.

As this division of the Carlovingian empire was permanent, it ought to have been mentioned in the text that the kingdom of France, which fell to Charles the Bald, had for its eastern boundary the Meuse, the Saone, and the Rhone; which, nevertheless, can only be understood of the Upper Meuse, since Brabant was certainly not comprised in it. Lothaire, the elder brother, besides Italy, had a kingdom called Lorrain, from his name (Lotharingia), extending from the mouth of the Rhine to Provence, bounded by that river on one frontier, by France on the other. Louis took all beyond the Rhine, and was usually styled, The Germanic.

21.

DECLINE OF CARLOVINGIANS.

Edit. 1826, p. 23. Edit. 1841, p. 15.

THE second period of Carlovingian history, or that which elapsed from the reign of Charles the Bald to the accession of Hugh Capet, must be reckoned the transitional state, through scenes of barbarous anarchy, from the artificial scheme devised by Charlemagne, in which the Roman and German elements of civil policy were rather in conflict than in union, to a new state of society—the feudal, which, though pregnant itself with great evil, was the means both of preserving the frame of European policy from disintegration, and of elaborating the moral and constitutional principles upon which it afterwards rested.

This period exhibits, upon the whole, a failure of the grand endeavour made by Charlemagne for the regeneration of his empire. This proceeded very much from the common chances of hereditary succession, especially when not counterbalanced by established powers independent of it. Three of his name, Charles the Bald, the Fat, and the Simple, had time to pull down what the great legislator and conqueror had erected. Encouraged by their pusillanimity and weakness, the nobility strove to revive the spirit of the seventh century. They entered into a coalition with the bishops, though Charles the Bald had often sheltered himself behind the crosier; and they compelled his son, Louis the Stammerer, not only to confirm their own privileges and those of the Church, but to style himself "King, by the grace of God and election of the people;" which, indeed, according to the established constitution, was no more than truth, since the absolute right to succession was only in the family. The inability of the crown to protect its subjects from their invaders, rendered this assumption of aristocratic independence absolutely necessary. In this age of agony, Sismondi well

says, the nation began to revive; new social bodies sprung from the carcase of the great empire. France, so defenceless under the Bald and the Fat Charleses, bristled with castles before 930. She renewed the fable of Deucalion; she sowed stones, and armed men rose out of them. The lords surrounded themselves with vassals; and had not the Norman incursions ceased before, they would have met with a much more determined resistance than in the preceding century. (Hist. des Français, iii. 218. 378. iv. 9.)

Notwithstanding the weakness of the throne, the promise of the Franks to Pepin, that they would never elect a king out of any other family, though broken on two or three occasions in the tenth century, seems to have retained its hold upon the nation, so that an hereditary right in his house was felt as a constitutional sentiment, until experience and necessity overcame it. The first interruption to this course was at the election of Eudes, on the death of Charles the Fat, in 888. Charles the Simple, son of Carloman, a prince whose short and obscure reign over France had ended in 884, and being himself the only surviving branch, in a legitimate line, of the imperial house (for the frequent deaths of those princes without male issue is a remarkable and important circumstance), was an infant of three years old. The kingdom was devastated by the Normans, whom it was just beginning to resist with somewhat more energy than for the last half century; and Eudes, a man of considerable vigour, possessed several counties in the best parts of France. The nation had no alternative but to choose him for their king. Yet, when Charles attained the age of fifteen, a numerous party supported his claim to the throne, which he would probably have substantiated, if the disparity of abilities between the competitors had been less manifest. Eudes, at his death, is said to have recommended Charles to his own party; and it is certain that he succeeded without opposition. His own weak character, however, exposing him to fresh rebellion, Robert, brother of Eudes, and his son-in-law, Rodolph, became kings of France, that is, we

find their names in the royal list, and a part of the kingdom acknowledged their sovereignty. But the south stood off altogether, and Charles preserved the allegiance of the north-eastern provinces. Robert, in fact, who was killed one year after his partisans had proclaimed him, seems to have no great pretensions, *de facto* any more than *de jure*, to be reckoned at all; nor does any historian give the appellation of Robert II. to the son of Hugh Capet. The father of Hugh Capet, Hugh the Great, son of Robert and nephew of Eudes, being Count of Paris and Orleans, who had bestowed the crown on his brother-in-law, Rodolph of Burgundy, instead of wearing it himself, paid such deference to the prejudices of at least the majority of the nation in favour of the house of Charlemagne, that he procured the election of Louis IV., son of Charles the Simple, a boy of thirteen years, and then an exile in England; from which circumstance he has borne the name of Outremer. And though he did not reign without some opposition from his powerful vassal, he died in possession of the crown, and transmitted it to be worn by his son, Lothaire, and his grandson, Louis V. It was on the death of this last young man, that Hugh Capet thought it time to set aside the rights of Charles, the late king's uncle, and call himself king, with no more national consent than the prelates and barons who depended on him might afford; principally, it seems, through the adherence of Adalberon, archbishop of Rheims, a city in which the kings were already wont to receive the crown. Such is the national importance which a merely local privilege may sometimes bestow. Even the voice of the capital, regular or tumultuous, which in so many revolutions has determined the obedience of a nation, may be considered as little more than a local superiority.

A writer distinguished among living historians, M. Thierry, has found a key to all the revolutions of two centuries in the antipathy of the Romans, that is, the ancient inhabitants, to the Franks or Germans. The latter were represented by the house of Charlemagne; the former, by that of Robert the Brave, through its valiant

descendants, Eudes, Robert, and Hugh the Great. And this theory of races, to which M. Thierry is always partial, and recurs on many occasions, has seemed to the judicious and impartial Guizot the most satisfactory of all that have been devised to elucidate the Carlovingian period, though he does not embrace it to its full extent. (Hist. de la Civilisation en France, Leçon 24.) Sismondi (vol. iii. p. 58.) had said in 1821, what he had probably written as early as M. Thierry: "La guerre entre Charles et ses deux frères fut celle des peuples romains des Gaules qui rejetaient le joug germanique; la querelle insignifiante des rois fut soutenue avec ardeur, parce qu'elle s'unissait à la querelle des peuples; et tous ces préjugés hostiles qui s'attachent toujours aux différences des langues et des mœurs, donnèrent de la constance et de l'acharnement aux combattans." This relates, indeed, to an earlier period, but still to the same conflict of races, which M. Thierry has taken as the basis of the resistance made by the Neustrian provinces to the later Carlovingians. Thierry finds a similar contest in the wars of Louis the Debonair. In this he is compelled to suppose that the Neustrian Franks fell in with the Gauls, among whom they lived. But it may well be doubted whether the distinction of Frank descent, and consequently of national supremacy, was obliterated in the first part of the ninth century. The name of *Franci* was always applied to the whole people; the kings are always *reges Francorum;* so that we might in some respects rather say that the Gauls or Romans had been merged in the dominant races than the reverse. Wealth, also, and especially that springing from hereditary benefices, was chiefly in the hands of the barbarians; they alone, as is generally believed, so long as the distinction of personal law subsisted, were summoned to county or national assemblies; they perhaps retained, in the reign of Louis the Debonair, though we cannot speak decisively as to this, their original language. It has been observed that the famous oath in the Romance language, pronounced by Louis of Germany at the treaty of Strasburg, in 842, and addressed to the army of his brother, Charles

the Bald, bears more traces of the southern or Provençal, than of the northern dialect; and it is probable that the inhabitants of the southern provinces, whatever might have been the origin of their ancestors, spoke no other. This would not be conclusive as to the Neustrian Franks. But this is a disputable question.

A remarkable presumption of the superiority still retained by the Franks as a nation, even in the south of France, may be drawn from the Placitum, at Carcassonne, in 918. (Vaissette, Hist. de Languèdoc, vol. ii. Append. p. 56.; Meyer, Institutions Judiciaires, vol. i. p. 419.) In this we find named six Roman, four Gothic, and eight Salian judges. It is certain that these judges could not have been taken relatively to the population of the three races in that part of France. Does it not seem most probable, that the Franks were still reckoned the predominant people? Probably, however, the personal distinction, founded on difference of laws, expired earlier in Neustria; not that the Franks fell into the Roman jurisprudence, but that the original natives adopted the feudal customs.

This specious theory of hostile races, in order to account for the downfall of the Carlovingian, or Austrasian, dynasty, has not been unanimously received, especially in the extent to which Thierry has urged it. M. Gaudet, the French editor of Richer (a contemporary historian, whose narrative of the whole period, from the accession of Eudes to the death of Hugh Capet, is published by Pertz in the Monumenta Germaniæ Historica, vol. iii., and contains a great quantity of new and interesting facts, especially from A. D. 966 to 987), appeals to this writer in contradiction of the hypothesis of M. Thierry. The appeal, however, is not solely upon his authority, since the leading circumstances were sufficiently known; and, to say the truth, I think, that more has been made of Richer's testimony in this particular view than it will bear. Richer belonged to a monastery at Rheims, and his father had been a man of some rank in the confidence of Louis IV. and Lothaire. He had, therefore, been nursed in respect for the house of

Charlemagne, though, with deference to his editor, I do not perceive that he displays any repugnance to the change of dynasty.

Though the differences of origin and language, so far as they existed, might be by no means unimportant in the great revolution near the close of the tenth century, they cannot be relied upon as sufficiently explaining its cause. The partisans of either family were not exclusively of one blood. The house of Capet itself was not of Roman, but probably of Saxon descent. The difference of races had been much effaced after Charles the Bald, but it is to be remembered that the great beneficiaries, the most wealthy and potent families in Neustria or France, were of barbarian origin. One people, so far as we can distinguish them, was by far the more numerous; the other, of more influence in political affairs. The personal distinction of law, however, which had been the test of descent, appears not to have been preserved in the north of France much after the ninth century; and the Roman, as has been said above, had yielded to the barbaric element—to the feudal customs. The Romance language, on the other hand, had obtained a complete ascendancy; and that not only in Neustria, or the parts west of the Somme, but throughout Picardy, Champagne, and part of Flanders. But if we were to suppose that these regions were still in some way more Teutonic in sentiment than Neustria, we certainly could not say the same of those beyond the Loire. Aquitaine and Languedoc, almost wholly Roman, to use the ancient word, or French, as they might now be called, among whose vine-covered hills the barbarians of the Lower Rhine had hardly formed a permanent settlement, or having done so, had early cast off the slough of their rude manners, had been the scenes of a long resistance to the Merovingian dynasty. The tyranny of Childeric and Clotaire, the barbarism of the Frank invaders, had created an indelible hatred of their yoke. But they submitted without reluctance to the more civilised government of Charlemagne, and displayed a spontaneous loyalty towards his line. Never did they recognise, at least with-

out force, the Neustrian usurpers of the tenth century, or date their legal instruments, in truth the chief sign of subjection that they gave, by any other year than that of the Carlovingian sovereign. If Charles the Simple reaped little but this nominal allegiance from his southern subjects, he had the satisfaction to reflect that they owned no one else.

But a rapacious aristocracy had pressed so hard on the weakness of Charles the Bald and his descendants that, the kingdom being wholly parcelled in great fiefs, they had not the resources left to reward self-interested services as before, nor to resist a vassal far superior to themselves. Laon was much behind Paris in wealth and populousness, and yet even the two capitals were inadequate representatives of the proportionate strength of the king and the count. Power, as simply taken, was wholly on one side; yet on the other was prejudice, or rather an abstract sense of hereditary right; and this sometimes became a source of power. But the long greatness of one family, its manifest influence over the succession to the throne, the conspicuous men whom it produced in Eudes and Hugh the Great, had silently prepared the way for a revolution, neither unnatural nor premature, nor in any way dangerous to the public interests. It is certainly probable that the Neustrian French had come to feel a greater sympathy with the house of Capet than with a line of kings who rarely visited their country, and whom they could not but contemplate as in some adverse relation to their natural and popular chiefs. But the national voice was not greatly consulted in those ages. It is remarkable that several writers of the nineteenth century, however they may sometimes place the true condition of the people in a vivid light, are constantly relapsing into a democratic theory. They do not by any means underrate the oppressed and almost servile condition of the peasantry and burgesses, when it is their aim to draw a picture of society; yet in reasoning on a political revolution, such as the decline and fall of the German dynasty, they ascribe to these degraded classes both the will and the power to effect it. The proud

nationality which spurned a foreign line of princes, could not be felt by an impoverished and afflicted commonalty. Yet when M. Thierry alludes to the rumour that the family of Capet was sprung from the commons (some said, as we read in Dante, from a butcher), he adds: — "Cette opinion, qui se conserva durant plusieurs siècles, ne fut pas nuisible à sa cause," — as if there had been as effective a tiers-état in 987, as 800 years afterwards. If, however, we are meant only to seek this sentiment among the nobles of France, I fear that self-interest, personal attachments, and a predominant desire of maintaining their independence against the crown, were motives far more in operation than the wish to hear the king speak French instead of German.

It seems, upon the whole, that M. Thierry's hypothesis, countenanced as it is by M. Guizot, will not afford a complete explanation of the history of France between Charles the Fat and Hugh Capet. The truth is, that the accidents of personal character have more to do with the revolutions of nations, than either philosophical historians, or democratic politicians like to admit. If Eudes and Hugh the Great had been born in the royal line, they would have preserved far better the royal power. If Charles the Simple had not raised too high a favourite of mean extraction, he might have retained the nobles of Lorraine and Champagne in their fidelity. If Adalberon, archbishop of Rheims, had been loyal to the house of Charlemagne, that of Capet would not, at least so soon, have ascended the throne. If Louis V. had lived some years, and left a son to inherit the lineal right, the more precarious claim of his uncle would not have undergone a disadvantageous competition with that of a vigorous usurper. M. Guadet has well shown, in his notice on Richer, that the opposition of Adalberon to Charles of Lorraine was wholly on personal grounds. No hint is given of any national hostility; but whatever of national approbation was given to the new family, and doubtless in Neustrian France it was very prevalent, must rather be ascribed to their own reputation than to any

peculiar antipathy towards their competitor. Hugh Capet, it is recorded, never wore the crown, though styling himself king, and took care to procure, in an assembly held in Paris, the election of his son Robert to succeed him; an example which was followed for several reigns.

A late Belgian writer, M. Gérard, in a spirited little work, La Barbarie Franque et la Civilisation Romaine (Bruxelles, 1845), admitting the theory of the conflict of races, indignantly repels the partisans of what has been called the Roman element. Thierry, Michelet, and even Guizot, are classed by him as advocates of a corrupted race of degenerate provincials, who called themselves Romans, endeavouring to set up their pretended civilisation against the free and generous spirit of the barbarians from whom Europe has derived her proudest inheritance. Avoiding the aristocratic arrogance of Boulainvilliers, and laughing justly at the pretensions of modern French nobles, if any such there are, which I disbelieve, who vaunt their descent as an order from the race of Franks, he bestows his admiration on the old Austrasian portion of the monarchy, to which, as a Belgian, he belongs. But in his persuasion that the two races were in distinct opposition to each other, and have continued so ever since, he hardly falls short of Michelet.

I will just add to this long note a caution to the reader, that it relates only to the second period of the Carlovingian kings, that from 888 to 987. In the reigns of Louis the Debonair and Charles the Bald, I do not deny that the desire for the separation of the empire was felt on both sides. But this separation was consummated at Verdun in 843, except that the kingdom of Lorraine being not long afterwards dismembered, a small portion of the modern Belgium fell into that of France.

22.

FEUDAL NOBLES.

Edit. 1826, p. 23. Edit. 1841, p. 15.

At the close of the ninth century, there were twenty-nine hereditary fiefs of the crown. At the accession of Hugh Capet, in 987, they had increased to fifty-five. (Guizot, Civilis. en France, Leçon 24.) Thierry maintains that those between the Loire and the Pyrenees were strictly independent, and bound by no feudal tie. (Lettres sur l'Hist. de France, Lett. ix.)

23.

SARACENS.

Edit. 1826, p. 24. Edit. 1841, p. 16.

These Saracens established themselves more inland than Frassineto. Creeping up the line of the Alps, they took possession of St. Maurice, in the Valais, from which the feeble kings of Transjurane Burgundy could not dislodge them.

24.

NORMAN INCURSIONS.

Edit. 1826, p. 28. Edit. 1841, p. 19.

The cowardice of the French, during the Norman incursions of the ninth century, has struck both ancient and modern writers, considering that the invaders were by no means numerous, and not better armed than the inhabitants. No one, says Paschasius Radbert, could have anticipated that a kingdom so powerful, extensive, and populous, would have been ravaged by a handful of barbarians.

(Mém. de l'Acad. des Inscr. vol. xv. p. 639.) Two hundred Normans entered Paris, in 865, to take away some wine, and retired unmolested; their usual armies seem to have been only of a few hundreds. (Sismondi, vol. iii. p. 170.) Michelet even fancies that the French could not have fought so obstinately at Fontenay as historians relate, on account of the effeminacy which ecclesiastical influence had produced. This is rather an extravagant supposition. But panic is very contagious, and sometimes falls on nations by no means deficient in general courage. It is to be remembered that the cities, even Paris, were not fortified (Mém. de l'Acad. vol. xvii. p. 289.); that the government of Charles the Bald was imbecile; that no efforts were made to array and discipline the people; that the feudal polity was as yet incomplete and unorganised. Can it be an excessive reproach, that the citizens fled from their dwellings, or redeemed them by money from a terrible foe against whom their mere superiority of numbers furnished no security? Every instance of barbarous devastation aggravated the general timidity. Aquitaine was in such a state that the pope removed the archbishop of Bordeaux to Bourges, because his province was entirely wasted by the pagans. (Sismondi, vol. iii. p. 210.) Never was France in so deplorable a condition as under Charles the Bald; the laity seem to have deserted the national assemblies; almost all his capitularies are ecclesiastical, he was the mere servant of his bishops. The clergy were now at their zenith; and it has been supposed that noble families becoming extinct (for few names of laymen appear at this time in history), the Church, which always gained and never lost, took the ascendant in national councils. And this contributed to render the nation less warlike, by depriving it of its natural leaders. It might be added, according to Sismondi's very probable suggestion, that the faith in relics, encouraged by the Church, lowered the spirit of the people. (Vol. iii. *passim*. Michelet, vol. ii. p. 120, *et post*). And it is a quality of superstition not to be undeceived by experience. Some have attributed the weakness of France at this period to the bloody battle of Fontenay, in 841. But if we

should suppose the loss of the kingdom on that day to have been forty thousand, which is a high reckoning, this would not explain the want of resistance to the Normans for half a century.

The beneficial effect of the cession of Normandy has hardly been put by me in sufficiently strong terms. No measure was so conducive to the revival of France from her abasement in the ninth century. The Normans had been distinguished by a peculiar ferocity towards priests; yet when their conversion to Christianity was made the condition of their possessing Normandy, they were ready enough to comply, and in another generation became among the most devout of the French nation. It may be observed, that pagan superstitions, though they often take great hold on the imagination, seldom influence the conscience or sense of duty; they are not definite or moral enough for such an effect, which belongs to positive religions, even when false. And as their efficacy over the imagination itself is generally a good deal dependent on local associations, it is likely to be weakened by a change of abode. But a more certain explanation of the new zeal for Christianity which sprung up among the Normans, may be found in the important circumstance, that, having few women with them, they took wives (they had made widows enough) from the native inhabitants. These taught their own faith to their children. They taught also their own language; and in no other manner can we so well account for the rapid extinction of that of Scandinavia in that province of France.

Sismondi discovers two causes for the determination of the Normans to settle peaceably in the territory assigned to them: the devastation which they had made along the coast, rendering it difficult to procure subsistence; and the growing spirit of resistance in the French nobility, who were fortifying their castles and training their vassals on every side. But we need not travel far for an inducement to occupy the fine lands on the Seine and Eure. Piracy and plunder had become their resource, because they could no longer find subsistence at home; they now found it

abundantly in a more genial climate. They would probably have accepted the same terms fifty years before.

25.

FIRST KINGS OF THE THIRD RACE.

Edit. 1826, p. 31. Edit. 1841, p. 21.

THIS has been put in the strongest language by Sismondi, Thierry, and other writers. Guizot, however, thinks that this has been urged too far, and that the first four Capetians were not quite so insignificant in their kingdom as has been asserted. "When we look closely at the documents and events of their age, we see that they have played a more important part, and exerted more influence, than is ascribed to them. Read their history; you will see them interfere incessantly, whether by arms or by negotiation, in the affairs of the county of Burgundy, of the county of Anjou, of the county of Maine, of the duchy of Guienne; in a word, in the affairs of all their neighbours, and even of very distant fiefs. No other suzerain certainly, except the dukes of Normandy, who conquered a kingdom, took a part at that time so frequently, and at so great a distance from the centre of his domains. Turn over the letters of contemporaries, for example those of Fulbert and of Yves, bishops of Chartres, or those of William III., duke of Guienne, and many others, you will see that the king of France was not without importance, and that the most powerful suzerains treated him with great deference." He appeals especially to the extant act of the consecration of Philip I., in 1059, where a duke of Guienne is mentioned among the great feudataries, and asks whether any other suzerain took possession of his rank with so much solemnity. (Civilisation en France, Leçon 42.) "As there was always a country called France and a French people, so there was always a king of the French; very far indeed from ruling the country called his kingdom, and without influence on the greater part of

the population, but yet no foreigner, and with his name inscribed at the head of the deeds of all the local sovereigns, as one who was their superior, and to whom they owed several duties." (Leçon 43.) It may be observed also that the Church recognised no other sovereign; not that all the bishops held of him, for many depended on the great fiefs, but the ceremony of consecration gave him a sort of religious character, to which no one else aspired. And Suger, the politic minister of Louis VI. and Louis VII., made use of the bishops to maintain the royal authority in distant provinces. (Leçon 42.) This nevertheless rather proves, that the germ of future power was in the kingly office, than that Hugh, Robert, Henry, and Philip exercised it. The most remarkable instance of authority during their reigns was the war of Robert in Burgundy, which ended in his bestowing that great fief on his brother. I have observed that the duke of Guienne subscribes a charter of Henry I. in 1051. (Rec. des Historiens, vol. xi. p. 589.) Probably there are other instances. Henry uses a more pompous and sovereign phraseology in his diplomas than his father; the young lion was trying his roar.

I concur on the whole in thinking with M. Guizot, that in shunning the language of uninformed historians, who spoke of all kings of France as equally supreme, it had become usual to depreciate the power of the first Capetians rather too much. He had, however, to appearance, done the same a very few years before the delivery of these lectures, in 1829; for in his Collection of Memoirs (vol. i. p. 6, published in 1825) he speaks speaks rather differently of the first four reigns: — C'est l'époque où le royaume de France et la nation française n'ont existé, à vrai dire, que de nom. He observes, also, that the chroniclers of the royal domain are peculiarly meagre, as compared with those of Normandy.

26.

LOUIS VI.

Edit. 1826, p. 32. Edit. 1841, p. 21.

SISMONDI has given a relative scale of the great fiefs, according to the number of modern departments which they contained. At the accession of Louis VI. the crown possessed about five departments; the count of Flanders held four; the count of Vermandois, two; the count of Boulogne, one; the count of Champagne, six; the duke of Burgundy, three; of Normandy, five; of Britany, five; the count of Anjou, three. Thirty-three departments, south of the Loire, he considers as hardly connected with the crown; and twenty-one were at that time dependent on the empire. (Vol. v. p. 7.) It is to be understood of course, that these divisions are not rigorously exact; and also that, in every instance, owners of fiefs with civil and criminal jurisdiction had the full possession of their own territories, subject more or less to their immediate lord, whether it were the king or another. The real domain of Louis VI. was almost confined to the five towns — Paris, Orleans, Estampes, Melun, and Compiegne (Id. p. 86.); and to estates, probably large, in their neighbourhood.

27.

ALBIGENSIAN WAR.

Edit. 1826, p. 38. Edit. 1841, p. 26.

M. FAURIEL edited for the Collection des Documens Inédits, in 1837, a metrical history of the Albigensian crusade, by a contemporary, calling himself William of Tudela, which seems to be an imaginary name. It contains 9578 verses. The author begins as a vehement enemy of the heretics and favourer of the crusade; but

becomes, before his poem is half completed, equally adverse to Montfort, Folquet, and the other chiefs of the persecution, though never adopting heretical opinions.

Sismondi says—bitterly, but not untruly—of Simon de Montfort: — "Habile guerrier, austère dans ses mœurs, fanatique dans sa religion, inflexible, cruel et perfide, il réunissait toutes les qualités qui pouvaient plaire à un moine." (Vol. vi. p.297.) The Albigensian sectaries had insulted the clergy, and hissed St. Bernard; which, of course, exasperated that irritable body, and aggravated their revenge. (Michelet iii. 306.) But the atrocities of that war have hardly been equalled, and Sismondi was not the man to conceal them.

28.

KNIGHTS TEMPLARS.

Edit. 1826, p. 61. Edit. 1841, p. 41.

IT may excite surprise that in any sketch, however slight, of the reign of Philip IV., no mention should be made of an event, than which none in his life is more celebrated — the fate of the Knights Templars. But the truth is, that when I first attended to the subject, almost forty years since, I could not satisfy my mind on the disputed problem, as to the guilt imputed to that order, and suppressed a note which I had written, as too inconclusive to afford any satisfactory decision. Much has been published since on the Continent, and the question has assumed a different aspect; though, perhaps, I am not yet more prepared to give an absolutely determinate judgment than at first.

The general current of popular writers in the eighteenth century was in favour of the innocence of the Templars; in England it would have been almost paradoxical to doubt of it. The rapacious and unprincipled character of Philip, the submission of Clement V. to his will, the apparent incredibility of the charges from their monstrousness, the

just prejudice against confessions obtained by torture and retracted afterwards — the other prejudice, not always so just, but in the case of those not convicted on fair evidence deserving a better name, in favour of assertions of innocence made on the scaffold and at the stake — created, as they still preserve, a strong willingness to disbelieve the accusations which came so suspiciously before us. It was also often alleged that contemporary writers had not given credit to these accusations, and that in countries where the inquiry had been less iniquitously conducted no proof of them was brought to light. Of these two grounds for acquittal, the former is of little value in a question of legal evidence, and the latter is not quite so fully established as we could desire.

Raynouard, who might think himself pledged to the vindication of the Knights Templars by the tragedy he had written on their fate, or at least would naturally have thus imbibed an attachment to their cause, took up their defence in a History of the Procedure. This has been reckoned the best work on that side, and was supposed to confirm their innocence. The question appears to have assumed something of a party character in France, as most history does; the honour of the crown, and still more of the church, had advocates; but there was a much greater number, especially among men of letters, who did not like a decision the worse for being derogatory to the credit of both. Sismondi, it may easily be supposed, scarcely treats it as a question with two sides; but even Michaud, the firm supporter of church and crown, in his History of the Crusades, takes the favourable view. M. Michelet, however, not under any bias towards either of these, and manifestly so desirous to acquit the Templars that he labours by every ingenious device to elude or explain away the evidence, is so overcome by the force and number of testimonies, that he ends by admitting so much as leaves little worth contending for by their patrons. He is the editor of the "Procès des Templiers" in the "Documens Inédits, 1841," and had previously given abundant evi-

dence of his acquaintance with the subject, in his "Histoire de France," vol. iv. p. 243. 345. (Bruxelles edition).

But the great change that has been made in this process, as carried forward before the tribunal of public opinion from age to age, is owing to the production of fresh evidence. The deeply learned orientalist, M. von Hammer, now Count Hammer Purgstal, in the sixth volume of a work published at Vienna in 1818, with the title "Mines de l'Orient exploitées," * inserted an essay in Latin, "Mysterium Baphometis Revelatum, seu Fratres Militiæ Templi qua Gnostici et quidem Ophiani, Apostasiæ, Idoloduliæ, et Impuritatis convicti per ipsa eorum Monumenta." This is designed to establish the identity of the idolatry ascribed to the Templars with that of the ancient Gnostic sects, and especially with those denominated Ophites, or worshippers of the Serpent; and to prove also that the extreme impurity, which forms one of the revolting and hardly credible charges adduced by Philip IV., is similar in all its details to the practice of the Gnostics.

This attack is not conducted with all the coolness which bespeaks impartiality; but the evidence is startling enough to make refutation apparently difficult. The first part of the proof, which consists in identifying certain Gnostic idols, or, as some suppose amulets, though it comes much to the same, with the description of what are called Baphometic, in the proceedings against the Templars, published by Dupuy, and since in the "Documens Inédits," is of itself sufficient to raise a considerable presumption. We find the word *metis* continually on these images, of which Von Hammer is able to describe twenty-four. Baphomet is a secret word ascribed to the Templars. But the more important evidence is that furnished by the comparison of sculptures extant on some Gnostic and Ophitic bowls, with those in churches built by the Templars. Of these there are many in Germany, and some in France. Von

* I give this French title, but there is also a German title-page, as most of the memoirs are either in that language or in Latin.

Hammer has examined several in the Austrian dominions, and collected accounts of others. It is a striking fact, that in some we find, concealed from the common observer, images and symbols extremely obscene; and as these, which cannot here be more particularly adverted to, betray the depravity of the architects, and cannot be explained away, we may not so much hesitate as at first to believe that impiety of a strange kind was mingled up with this turpitude. The presumptions of course, from the absolute identity of many emblems in churches with the Gnostic superstitions in their worst form, grow stronger and stronger by multiplication of instances; and though coincidence might be credible in one, it becomes infinitely improbable in so many. One may here be mentioned, though among the slightest resemblances. The Gnostic emblems exhibit a peculiar form of cross T; and this is common in the churches built by the Templars. But the freemasons, or that society of architects to whom we owe so many splendid churches, do not escape M. von Hammer's ill opinion better than the Templars. Though he conceives them to be of earlier origin, they had drunk at the same foul spring of impious and impure Gnosticism. It is rather amusing to compare the sympathy of our own modern ecclesiologists with those who raised the mediæval cathedrals, their implicit confidence in the piety which ennobled the conceptions of these architects, with the following passage, in a memoir by M. von Hammer, "Sur deux Coffrets Gnostiques du moyen Age, du cabinet de M. le duc de Blacas. Paris, 1832."

"Les architectes du moyen âge initiés dans tous les mystères du Gnosticisme le plus dépravé, se plaisaient à en multiplier les symboles au dehors et au dedans de leurs églises; symboles dont le véritable sens n'était entendu que des adeptes, et devaient rester voilés aux yeux des profanes. Des figures scandaleuses, semblables à celles des églises de Montmorillon et de Bordeaux, se retrouvent sur les églises des Templiers à Eger en Bohême, à Schongrabern en Autriche, à Fornuovi près de Parme, et en d'autres lieux; nommément le chien (canis aut gattus

niger) sur les bas-reliefs de l'église gnostique d'Erfurt." (p. 9.) The Stadinghi, heretics of the thirteenth century, are charged, in a bull of Gregory IX., with exactly the same profaneness, even including the black cat, as the Templars of the next century. This is said by Von Hammer to be confirmed by sculptures. (p. 7.)

The statutes of the Knights Templars were compiled in 1128, and, as it is said, by St. Bernard. They have been published in 1840 from manuscripts at Dijon, Romé, and Paris, by M. Maillard de Chambure, Conservateur des Archives de Bourgogne.

The title runs:—"Règles et Statuts secrets des Templiers." But as the French seems not so ancient as the above date, they may perhaps be a translation. It will be easily supposed that they contain nothing but what is pious and austere. The knights, however, in their intercourse with the East, fell rapidly into discredit for loose morals and many vices; so that Von Hammer rather invidiously begins his attack upon them by arguing the à priori probability of what he is about to allege. Some have accordingly endeavoured to steer a middle course; and, discrediting the charges brought generally against the order, have admitted that both the vice and the irreligion were truly attributed to a great number. But this is not at all the question; and such a pretended compromise is nothing less than an acquittal. The whole accusations which destroyed the order of the Temple relate to its secret rites, and to the mode of initiation. If these were not stained by the most infamous turpitude, the unhappy knights perished innocently, and the guilt of their deaths lies at the door of Philip the Fair.

The novel evidence furnished by sculpture against the Templars has not been universally received. It was early refuted, or attempted to be refuted, by Raynouard and other French writers. "Il est reconnu aujourd'hui, même en Allemagne," says M. Chambure, editor of the Règles et Statuts secrets des Templiers, "que le prétendu culte baphometique n'est qu'une chimère de ce savant, fondée sur un erreur de numismatique et d'architectonographie."

(p. 82.) As I am not competent to form a decisive opinion, I must leave this for the more deeply learned. The proofs of M. von Hammer are at least very striking, and it is not easy to see how they have been overcome. But it is also necessary to read the answer of Raynouard in the "Journal des Savans" for 1819, who has been partially successful in repelling some of his opponent's arguments, though it appeared to me that he had left much untouched. It seems that the architectural evidence is the most positive, and can only be resisted by disproving its existence, or its connexion with the Freemasons and Templars.

29.

JOHN I.

Edit. 1826, p. 63. Edit. 1841, p. 42.

ANCIENT writers, Sismondi tells us (ix. 344.), do not call this infant any thing but the child who was to be king; the maxim of later times, "Le roi ne meurt pas," was unknown. I suspect, nevertheless, that the strict hereditary succession was better recognised before this time than Sismondi here admits; compare what he says afterwards of a period very little later, vol. xi. 6.

30.

ROBERT OF ARTOIS.

Edit. 1826, p. 65. Edit. 1841, p. 44.

SISMONDI (x. 44.) does not seem to be convinced that Robert of Artois was guilty of forgery; but perhaps he is led away by his animosity against kings, especially those of the house of Valois. M. Michelet informs us (v. 30.) that the deeds produced by the demoiselle Divion, on which Robert founded his claims, are in the Trésor des Chartes, and palpable forgeries.

31.

REGENCY.

Edit. 1826, p. 68. Edit. 1841, p. 45.

SISMONDI does not mention the claim of Edward to the regency after the death of Charles IV., though he supposes his pretensions to have been taken into consideration by the lords and doctors of law, whom he asserts, following the continuator of William de Nangis, to have consulted together, before Philip of Valois took the title of regent. (Vol. x. p. 10.) Michelet, more studious of effect than minute in details, makes no allusion to the subject.

32.

FLANDERS.

Edit. 1826, p. 73. Edit. 1841, p. 50.

MICHELET dwells on the advantage which Edward gained by the commerce of England with Flanders: "Le secret des batailles de Crecy, de Poitiers, est aux comptoirs des marchands de Londres, de Bordeaux, et de Bourges." (vol. v. p. 6.) France had no internal trade; the roads were dangerous on account of robbers, and heavy tolls were to be paid; fiscal officers had replaced the feudal lords. The value of money was perpetually varying far more than in England. (Id. p. 12.) Certainly the comparative prosperity of the latter country supplied Edward with the sinews of war. France could not afford to maintain a well appointed infantry.

"Une tactique nouvelle," M. Michelet afterwards very well observes (p. 81.), "sortait de l'état nouveau de la société; ce n'était pas un œuvre de génie, ni de réflexion. Edouard III. n'était ni un Gustave Adolphe ni un Frédéric II. Il avait employé les fantassins faute de cavaliers. . . . La bataille de Crecy reveilla un secret dont personne ne se

doutait, l'impuissance militaire de ce monde feodal, qui s'était cru le seul monde militaire." Courtray might have given some suspicion of this; but Courtray was much less of a "bataille rangée" than Crecy.

33.

ARCHERS.

Edit. 1826, p. 75. Edit. 1841, p. 51.

IT is by an odd oversight that Sismondi has said (x. 295.), "Les Anglais étaient accoutumés à se servir sans cesse de *l'arbalète*." The cross-bow was looked upon as a weapon unworthy of a brave man; a prejudice which afterwards prevailed with respect to fire-arms. A romancer praises the emperor Conrad,

> "Par un effort de lance et d'écu,
> Conquérant tous ses ennemis,
> Y à arbalestreis ni fu mis;"

quoted by Boucher in his translation of "Il Consolato del Mare," p. 518. Even the long-bow might incur this censure; or any weapon in which the combatants fought *eminus*. But if we look at the plate-armour of the fifteenth century, it may seem that a knight had not much to boast of the danger to which he exposed himself, especially when encountering infantry.

34.

THE PESTILENCE.

Edit. 1826, p. 78. Edit. 1841, p. 53.

ANOTHER pestilence, only less destructive than the former, wasted both France and England in 1361. Sismondi bitterly remarks (x. 342.), that between four and five millions who died of the former plague in France merely diminished the number of the oppressed, producing no

perceptible effect. But this is exaggerated. The plague caused a truce of several months. The war was in fact carried on with less vigour for some years. It is, however, by no means unlikely, that the number of deaths has been overrated. Nothing can be more loose than the statistical evidence of mediæval writers. Thus 30,000 are said to have died at Narbonne. (Michelet, v. 94.) But had Narbonne so many to lose? At least, would not the depopulation have been out of all proportion to other cities?

35.

FROM HIS MINORITY.

Edit. 1826, p. 95. Edit. 1841, p. 65.

THIS is incorrectly expressed, as the history shows. The minority of Charles ceased soon after his accession; it should have run, "from his assumption of power into his own hands."

36.

ISABEL OF BAVARIA.

Edit. 1826, p. 95. Edit. 1841, p. 65.

SISMONDI inclines to speak more favourably of this queen than most have done: "Dans les temps postérieurs on s'est plu à faire un monstre de Isabeau de Bavière." He discredits the suspicion of a criminal intercourse with the Duke of Orleans, and represents her as merely an indolent woman, fond of good cheer. Yet he owns that the king was so neglected as to suffer from an excessive want of cleanliness, sometimes even from hunger. (xii. 218. 225.) Was this no imputation on his wife? See too Michelet, vi. 42.

37.

LOUIS OF ORLEANS.

Edit. 1826, p. 96. Edit. 1841, p. 66.

MICHELET represents this young prince as regretted and beloved; but his language is full of those strange contrasts and inconsistencies, which, for the sake of effect, this most brilliant writer sometimes employs. "Il avait, dans ses emportemens de jeunesse, terriblement vexé le peuple; il fut maudit du peuple, pleuré du peuple. Vivant, il couta bien de larmes; mais combien plus, mort! Si vous eussiez demandé à la France si ce jeune homme était bien digne de tant d'amour, elle eût répondu, Je l'aimais. Ce n'est pas seulement pour le bien qu'on aime; qui aime, aime tout, les défauts aussi. Celui-ci plut comme il était, mêlé de bien et de mal." (Hist. de France, vi. 6.) What is the meaning of this love for one who, he has just told us, was cursed by the people? And if Paris was the representative of France, how did the people show their affection for the Duke of Orleans, when they were openly and vehemently the partisans of his murderer? On the first return of the Duke of Burgundy to Paris after the assassination, the citizens shouted Noel, the usual cry on the entrance of the king, to the great displeasure of the queen and other princes. "Et pour vrai, comme dit est dessus, il estoit très fort aymé du commun peuple de Paris, et avoient grand espérance qu'iceluy Duc eust très-grand affection au Royaume, et à la chose publicque, et avoient souvenance des grans tailles qui avoient esté mises sus depuis la mort du Duc Philippe de Bourgogne père d'iceluy, jusques à l'heure présente, lesquelles ils entendoient que feust par le moyen dudit Duc d' Orleans. Et pource estoit grandement encouru en l'indignation d'iceluy peuple, et leur sembloit que Dieu de sa grâce les avoit très-grandement pour récommandez, quand il avoit souffert qu'ils fussent hors de sa subjection et governement, et qu'ils en estoient delivrez."

Monstrelet, 34. Compare this with what M. Michelet has written.

38.

PHILIP LE BON.

Edit. 1826, p. 104. Edit. 1841, p. 70.

It should have been said, "not all his depravity;" for Philip II. was a very bad man, and a very bad sovereign, and would have passed for such in another age.

39.

JOAN OF ARC.

Edit. 1826, p. 110. Edit. 1841, p. 75.

I have followed the common practice of translating Jeanne d'Arc, by Joan of Arc. It has been taken for granted, that Arc is the name of her birthplace. Southey says:

> "She thought of Arc, and of the dingled brook
> Whose waves, oft leaping in their craggy course,
> Made dance the low-hung willow's dripping twigs;
> And, where it spread into a glassy lake,
> Of that old oak, which on the smooth expanse
> Imaged its hoary mossy-mantled boughs."

And in another place,

> —— "her mind's eye
> Beheld Domremy and the plains of Arc."

It does not appear, however, that any such place as Arc exists in that neighbourhood, though there is a town of that name at a considerable distance. Joan was, as is known, a native of the village of Domremy in Lorraine. The French writers all call her Jeanne d'Arc, with the exception of one, M. Michelet (vii. 62.), who spells her name Darc, which in a person of her birth seems more

probable, though I cannot account for the uniform usage of an apostrophe and capital letter.

I cannot pass Southey's Joan of Arc without rendering homage to that early monument of his genius, which perhaps he rarely surpassed. It is a noble epic, never languid, and seldom diffuse; full of generous enthusiasm, of magnificent inventions, and with a well constructed fable, or rather selection of history. Michelet, who thinks the story of the Maid unfit for poetry, had apparently never read Southey; but the author of an article in the "Biographie Universelle" says very well:—"Le poëme de M. Southey en Anglais, intitulé Joan of Arc, est la tentative la plus heureuse que les Muses aient faites jusqu' ici pour célébrer l'héroïne d'Orléans. C'est encore une des singularités de son histoire, de voir le génie de la poësie Anglaise inspirer de beaux vers en son honneur, tandis que celui de la poësie Francaise a été jusqu'ici rebelle à ceux qui ont voulu la chanter, et n'a favorisé que celui qui a outragé sa mémoire." If, however, the muse of France has done little justice to her memory, it has been reserved for another Maid of Orleans, as she has well been styled, in a different art, to fix the image of the first in our minds, and to combine, in forms only less enduring than those of poetry, the purity and inspiration with the unswerving heroism of the immortal Joan.

40.

AGNES SOREL.

Edit. 1826, p. 112. Edit. 1841, p. 76.

SISMONDI (vol. xiii. p. 204.), where he first mentions Agnes Sorel, says that many of the circumstances told of her influence over Charles VII. are fabulous. "Cependant il faut bien qu'Agnès ait merité, en quelque manière, la reconnoissance qui s'est attachée à son nom." This is a loose and inconclusive way of reasoning in history; many popular traditions have no basis at all. And

in p. 345. he slights the story told in Brantôme to the honour of Agnes, as well he might, since it is ridiculously untrue that she threatened Charles to go to the court of Henry VI., knowing herself to be born to be the mistress of a great king. Sismondi afterwards (p. 497. and 604.), quotes, as I have done, Chartier and Jacques du Clercq; but without adverting to the incongruity of their dates with the current story. M. Michelet does not seem to attach much credit to it, though he adopts the earlier date for the king's attachment to Agnes.

41.

CHARACTER OF LOUIS XI.

Edit. 1826, p. 120. Edit. 1841, p. 81.

SISMONDI (vol. xiv. p. 312.) and Michelet (vol. ix. p. 347.) agree in thinking Louis XI. no worse than other kings of his age; in fact the former seems to make no distinction between one king and another. Louis was just and even attentive towards the lower people, and spared the blood of his soldiers. But he had imbibed a notion that treachery and cruelty could not be carried too far against his enemies, and especially against his rebellious subjects. Louis composed for his son's use, or caused to be composed, a political treatise entitled "Le Rosier des Guerres," which has never been published. It is written in a spirit of public morality very unlike his practice. (Sismondi, vol. xiv. p. 616.) Thus two royal Anti-Machiavels have satirised themselves.

42.

LEAGUE OF THE PUBLIC WEAL.

Edit. 1826, p. 120. Edit. 1841, p. 82.

SISMONDI has a just observation on the League of the Public Weal. "Le nom seul du Bien Public qui fut donné

à cette ligue, était un hommage au progrès des lumières ; c'était la profession d'un principe qui n'avait point encore été proclamé ; c'est que le bien public doit être le but du gouvernement ; mais les princes qui s'associaient pour l'obtenir, étaient encore bien peu en état de connaître sa nature." (xiv. 161.)

43.

DUKE OF GUIENNE.

Edit. 1826, p. 123. Edit. 1841, p. 83.

SISMONDI and Michelet do not believe that the Duke of Guienne was poisoned by his brother ; he had been ill for several months.

44.

AMBITION OF CHARLES.

Edit. 1826, p. 126. Edit. 1841, p. 86.

CHARLES had a vague notion of history, and confounded the province or duchy of Burgundy, which had always appertained to the French crown, with Franche-Comté and other countries which had belonged to the kingdom of Burgundy. Hence he talked at Dijon, in 1473, to the Estates of the former, about the kingdom of Burgundy, " que ceux de France ont longtems usurpé, et d'icelui fait duché ; que tous les sujets doivent bien avoir à regret, et dit qu'il avait en soi des choses qu'il n'appartenait de savoir à nul qu'à lui." Michelet (ix. 162.) is the first who has published this.

45.

PARLIAMENT OF PARIS.

Edit. 1826, p. 134. Edit. 1841, p. 90.

THIS is incorrect; the appellant jurisdiction of the parliament of Paris was not reserved.

46.

BRITANY.

Edit. 1826, p. 136. Edit. 1841, p. 92.

CHARLEMAGNE subdued the whole of Britany about the end of the eighth century. But under Charles the Bald Nomenoe assumed the crown; and some others in succession bore the name of king. These kings, however, seem to have been feudally subject to France. Charles the Simple ceded to the Normans whatever rights he possessed over Britany; and the dukes of that country (for the royal title was now dropped) always did homage to Normandy.

47.

MARRIAGE OF CHARLES VIII.

Edit. 1826, p. 138. Edit. 1841, p. 94.

THIS is one of the coolest violations of ecclesiastical law in comparatively modern times. Both contracts, especially that of Anne, were obligatory, so far at least that they could not be dissolved without papal dispensation. This was obtained; but it bears date eight days after the ceremony between Charles and Anne. (Sismondi, xv. 106.)

48.

ARTOIS AND FRANCHE-COMTE.

Edit. 1826, p. 139. Edit. 1841, p. 94.

BOTH these provinces had revolted to Maximilian; so that Charles must have continued the war at some disadvantage. (Sismondi, xv. 135.)

49.

DAUPHINÉ.

Edit. 1826, p. 139. Edit. 1841, p. 94.

SISMONDI (xiv. 3.) dates the reunion of Dauphiné to the crown from 1457, before which time it was governed by the Dauphin for the time being as a foreign sovereignty.

50.

HISTORY OF FRANCE, BY VELLY, VILLARET, AND GARNIER.

Edit. 1826, p. 140. Edit. 1841, p. 95.

THIS history is now but slightly esteemed in France, especially the volumes written by the Abbé Velly. The writers were too much imbued with the spirit of the old monarchy (though no adulators of kings, and rather liberal according to the standard of their own age), for those who have taken the sovereignty of the people for their creed. Nor are they critical and exact enough for the present state of historical knowledge. Sismondi and Michelet, especially the former, are doubtless superior; but the reader will not find in the latter as regular a narration of facts as in Velly and Villaret. Sismondi has as many prejudices on one side as they have on the opposite.

CHAP. II.

FEUDAL SYSTEM.

51.

ANCIENT GERMANY.

Edit. 1826, p. 143. Edit. 1841, p. 99.

In the first paragraph of this chapter it ought not to have been said, though the authority of Cæsar supports the assertion*, that the occupations of the ancient Germans were chiefly the chase and pasturage; since this conceals that they were also an agricultural people, with fixed dwellings, and in a more advanced condition than pastoral nations usually are. They might have little arable land, relatively to the extent of the country; but the population was thin. When it is said that "the cultivation was inconstant," the allusion must have been to the statement of Cæsar and Tacitus, that *arva in annos mutant;* they never occupied the same land two years in succession, having, as the former tells us, fresh allotments made annually by the magistrates.† But this could not have been an absolute abandonment of land once cultivated, which Horace imputes to the migratory Scythians: "Nec cultura placet longior annuo." It could have been no more than leaving it in fallow for a season longer perhaps than would be the custom in Italy, and therefore attracting the

* Vita omnis in venationibus et studiis rei militaris consistit. . . . Agriculturæ non student, nec quisquam agri modum certum aut fines proprios habet. De Bello Gall. l. vi.

Luden, who had examined the ancient history of his country with the most persevering diligence, observes that Cæsar knew nothing of the Germans, except what he had collected about the Suevi or the Marcomanni. Geschichte der Deutschen Völker, i. 484.

† Magistratus ac principes in annos singulos gentibus cognationibusque hominum, qui una coierunt, quantum iis, et quo loco visum est, attribuunt agri; atque anno post alio transire cogunt.

notice of Roman writers. But the inhabitants of the same *gau* must of necessity have returned to the old lands in tillage, when they thought them sufficiently refreshed. It is said also too slightly in the text, that some change *may* have been wrought between the ages of Tacitus and of Clovis; since, with respect at least to the German tribes nearest to the Rhine, this is of the highest probability. If the Salic laws were drawn up before the occupation of Gaul by the Franks, as seems the better opinion, it is manifest that lands were held by them in determinate possession; and in other respects it is impossible that the manners described by Tacitus should not have undergone change.

It is almost of course with the investigators of Teutonic antiquities to rely with absolute confidence on the authority of Tacitus, in his treatise "De Moribus Germanorum." And it is indeed a noble piece of eloquence—a picture of manners so boldly drawn, and, what is more to the purpose, so probable in all its leading characteristics, that we never hesitate, in reading, to believe. It is only when we have closed the book, that a question may occur to our minds, whether the Roman writer, who had never crossed the Rhine, was altogether a sufficient witness for the internal history, the social institutions, of a people so remote and so dissimilar. But though the sources of his information do not appear, it is manifest that they were copious. His geographical details are minute, distinct, and generally accurate. Perhaps in no instance have his representations of ancient Germany been falsified by direct testimony, if in a few circumstances there may be reason to suspect their exact faithfulness.

In the very slight mention of German institutions which I have made in the text, there can be nothing to excite doubt. They are what Tacitus might easily learn, and what, in fact, we find confirmed by other writers. But when he comes to a more exact description of the social constitution, and of the different orders of men, it may not be unreasonable to receive his testimony with a less unhesitating assent than has commonly been accorded to

it. A sentence, a word of Tacitus has passed for conclusive; and no theory which they contradict would be admitted. A modern writer, however, has justly pointed out that his informers might easily be deceived about the social institutions of the tribes beyond the Rhine; and, in fact, it is not on Tacitus himself, but on these unknown authorities, that we rely for the fidelity of his representations. We may readily conceive, by our own experience, the difficulty of obtaining a clear and exact knowledge of laws, customs, and manners for which we have no corresponding analogies. "Let us," says Luden to his countrymen, "ask an enlightened Englishman who speaks German, concerning the political institutions of his country, and it will be surprising how little we shall understand from him. Ask him to explain what is a freeman, a freeholder, a copyholder, or a yeoman, and we shall find how hard it is to make national institutions and relations intelligible to a foreigner." (Luden, Geschichte des Deutschen Volkes, vol. i. p. 702.)

This is of course not designed to undervalue the excellent work of Tacitus, to which almost exclusively we are indebted for any acquaintance with the progenitors of the Anglo-Saxons and the Franks; but to point out a general principle, which may be far better applied to inferior writers, that they give a colour of their own country to their descriptions of foreign manners, and especially by the adoption of names only analogically appropriate. Thus the words, *servus*, *libertinus*, *ingenuus*, *nobilis*, are not necessarily to be understood in a Roman sense when Tacitus employs them in his treatise on Germany. *Servus* is in Latin a slave; but the German described by him under that name is the *lidus*, subject to a lord, and liable to payments, but not without limit, as he himself explains. "Frumenti modum dominus, aut pecoris, aut vestis, ut colono, imperat; et servus hactenus paret."[2] Here *colonus*, in the age of Tacitus, was as much a wrong word in one direction, as *servus* was in another. For we believe that the *colonus* of early Rome was a tenant, or farmer, yielding rent, but

absolutely a free man *; though in the third century, after barbarians had been settled on lands in the empire, we find it applied to a semi-servile condition. It is more worthy to be observed, that his account of the kingly office among the Germans is not quite consistent. Sometimes it appears as if peculiar to certain tribes, "iis gentibus quæ regnantur" (c. 25.); and here he seems to speak of the power as very great, opposing it to liberty; while at other times we are led to suppose an aristocratic senate and an ultimate right of decision in the people at large, with a very limited sovereign at the head (c. 7. 11. &c.). This triple constitution has been taken by Montesquieu for the foundation of our own in the well known words — "Ce beau système a été trouvé dans les bois."

52.

PARTITION OF LANDS.

Edit. 1826, p. 144. Edit. 1841, p. 97.

IT is not easy to explain these partitions made by the barbarous nations, on their settlement in the empire; and, what would be still more remarkable if historians were not so defective in that age, we find no mention of such partitions in any records, excepting their own laws and a few documents of the same class. Montesquieu says, "Ces deux tiers n'étaient pas que dans certains quartiers qu'on leur assigna" (l. 30. c. 8.). Troja seems to have the same opinion as to the first settlement of the Burgundians in Gaul, but admits a general division in 471: Storia d'Italia nel medio evo (iii. 1293.). It is indeed impossible to get over the proof of such a partition, or at least one founded on a general law, arising from the fifty-fourth section of the Burgundian code: "Eodem tempore quo populus noster mancipiorum tertiam, et duas terrarum partes accepit." This code was promulgated by Gundo-

* Vide Facciolati Lexicon.

bad early in the sixth century. It contains several provisions protecting the Roman in the possession of his third against any encroachment of the *hospes*, a word applied indifferently to both parties, as, in common Latin, to *host* and *guest*.

The word *sortes*, which occurs both with the Burgundians and Visigoths, has often been referred to the general partition, on the hypothesis that the lands had been distributed by lot. This perhaps has no evidence except the erroneous inference from the word *sors*, but it is not wholly improbable. Savigny, indeed, observes, that both the barbarian and the Roman estates were called *sortes*, referring to Leges Visigothorum, lib. x. tit. 2. l. 1., where we find, in some editions, "sortes Gothicæ vel Romanæ;" but all the manuscripts, according to Bouquet, read "sortes Gothicæ et tertia Romanorum," which, of course, gives a contrary sense. (Rec. des Hist. iv. 430.)* It seems, from some texts of the Burgundian law, that the whole territory was not partitioned at once; because, in a supplement to the code not much before 520, provision is made for new settlers, who were to receive only a moiety. "De Romanis hoc ordinavimus, ut non amplius a Burgundionibus qui infra venerunt, requiratur, quam, ut præsens necessitas fuerit, medietas terræ. Alia vero medietas cum integritate mancipiorum a Romanis teneatur; nec exinde ullam violentiam patiantur." (Leges Burgundionum, Additamentum Secundum, c. 11.) In this, as in the whole Burgundian law, we perceive a tenderness for the Roman inhabitant, and a continual desire to place him, as far as possible, on an equal footing with his new neighbour. The reason assigned for the partition is necessity;

* Procopius says, of the division made by Genseric in Italy, Αἴθνας τοὺς ἄλλους ἀφείλετο μὲν τοὺς ἄγροὺς, οἱ πλεῖστοι τε ἦσαν καὶ ἄριστοι· ἐς δὲ τὸ τῶν Βανδίλων διένειμεν ἔθνος· καὶ ἀπ' αὐτοῦ κλῆροι Βανδίλων οἱ ἀγροὶ οὗτοι ἐς τοδὲ καλοῦνται τοῦ χρόνου. . . . . καὶ τὰ μὲν χωρία ξύμπαντα ὅσα τοῖς τε παῖσι καὶ τοῖς ἄλλοις Βανδίλοις Γιζέριχος παραδεδώκει, οὐδεμίας φοροῦ ἀπαγωγῆς ὑποτέλη ἐκέλευσεν εἶναι.—De Bello Vandal. l. i. c. 8. This passage gives no confirmation to the hypothesis of a partition by lot, but the contrary; and though we cannot reason absolutely from the analogy of Africa to Gaul, it is natural to interpret κλῆροι Βανδίλων and sortes Salicæ in the same manner.

the Burgundian must live. It is true, that to assign him two thirds of the land strikes us as an enormous spoliation. Montesquieu supposes that the barbarian took open and pasture lands, leaving the tilth to the ancient possessor, and that this accounts for the smaller proportion of slaves which he required (l. 30. c. 9.). Sismondi has made a similar suggestion. It is dwelt upon by Troja, that the Lombards, taking a third of the produce, instead of a portion of the lands themselves, reduced all the original possessors to the rank of tributaries. In none of the barbarous kingdoms was the Roman of so low a *status* as in theirs. But it may be said that the ancient law of nations, exercised by none more unsparingly than by the Romans themselves in Italy, confiscated the whole soil; that if the Visigoths and Burgundians spared one third, if the Franks left some Roman possessors, this was an indulgent relaxation of their right. And this would be an excuse, if we could for a moment look upon the barbarians as having a just cause of war. The contrary, however, is manifest in almost every case.

M. Fauriel thinks it probable, that the Franks made, like the other barbarians, a partition, more or less regular, of the Roman lands in northern France. (Hist. de la Gaule Méridionale, ii. 34.) Guizot takes a somewhat different view, and conceives that each chief took what best suited him, and lived there with his followers about him. Civilis. en France, Leçon 32.) But if the Franks adopted so aristocratic a division as to throw the lands which they occupied into the hands of a few proprietors, they must have gone on very different principles from the other nations, among whom we should infer, from their laws, a much greater equality to have been preserved. It seems, however, most probable on the whole, considering the silence of historians and laws, that the Franks made no systematic distribution of lands, like the earlier barbarians. They were, perhaps, less numerous, and, being at first less civilised, would feel more reluctance at submitting to any fixed principle of appropriation. That they dispossessed many of the Roman owners on the right bank of the Loire,

cannot well be doubted. For, though Raynouard, who treads in the steps of Dubos, denies that they took any but fiscal lands, which had belonged to the imperial domains (Hist. du Droit Municipal, i. 256.), Franks were surely as little disposed, and as little able to live without lands as Burgundians, and they were a rougher people.* Yet both with respect to them and the other barbarians we may observe, that the spoliation was not altogether so ruinous as would naturally be presumed. In consequence of the long decline and depopulation of the empire, the fruit of fiscal oppression, of frequent invasion, and civil wars, we may add, also, of pestilences and unfavourable seasons, much land had gone out of cultivation in Gaul; and though the proportion taken by the Goths and Burgundians was enormous, they probably occupied, in great measure, what the Roman proprietor had not the means of tilling.

This subject, after all, is by no means clear of embarrassment, especially as regards the Visigothic and Burgundian partitions. We are driven to suppose a dispersion of these conquering nations among their subjects, each man living separately on his *sors*, contrary to the policy of all invaders; we are, apparently, to presume an equality of numbers between the Roman possessors and the barbarians, so that each should have his own *hospes*. The latter hypothesis may, perhaps, be dispensed with, or considerably modified; but I do not see how to get rid of the former.

* M. Lehuerou supposes that the Franks, who served the empire in Gaul under the *predecessors* of Clovis, had received lands like the Burgundians and Visigoths; so that they were already in a great measure provided for, and that their subsequent acquisitions would be at the expense of the nations which they conquered. (Instit. Merov. i. 237. 268.) But the private estates of the Franks seem to have been principally in the north of France.

53.

ALODIAL LANDS.

Edit 1826, p. 144. Edit. 1841, p. 97.

ALODIUM has by many been derived from *All* and *odh*, property. (Du Cange, et alii.) But M. Guizot, with some positiveness, brings it from *loos*, lot; thus confining the word to lands acquired by lot on the conquest. But in the first place this assumes a regular partition to have been made by the Franks, which he, in another place, as has been seen, does not acknowledge; and secondly, *Alodium*, or, in its earlier form, *Alodis*, is used for all hereditary lands. (See Grimm, Deutsche Rechts Alterthümer, p. 492.) In the Orkneys, where feudal tenures were not introduced, the alodial proprietor is called an *udaller*, thus lending probability to the former derivation of *alod;* since it is only an inversion of the words *all* and *odh;* but it seems also to corroborate the notion of Luden, as it had been of Leibnitz, that the word *adel* or *ethel*, applied to designate the nobler class of Germans, had originally the same sense; it distinguished absolute or alodial property from that which, though belonging to freemen, was subject to some conditions of dependency. (Gesch. des Deutschen Volkes, vol. i. p. 719.)

The word *sors*, which seems to have misled several writers, when applied to land, means only an integral patrimony, as it means capital opposed to interest, when applied to money. It is common in the civil law, and is no more than the Greek κλῆρος; but it had been peculiarly applied to the lands assigned by the Romans to the soldiery after a conquest, which some suppose, I know not on what evidence, to have been by lot. (Du Cange, voc. Sors.) And hence this term was most probably adopted by the barbarians, or rather those who rendered their laws into Latin. If the Teutonic word *loos* was sometimes used for a *mansus* or manor, as M. Guizot informs us, it seems most probable that this was a literal translation of *sors*, bearing with it the secondary sense.

54.

SALIC LAWS.

Edit. 1826, p. 145. Edit. 1841, p. 98.

THE Salic law exists in two texts; one purely Latin, of which there are fifteen manuscripts; the other mingled with German words, of which there are three. Most have considered the latter to be the original; the manuscripts containing it are entitled *Lex Salica antiquissima* or *vetustior;* the others generally run, *Lex Salica recentior*, or *emendata*. This seems to create a presumption. But M. Wraida, who published a history of the Salic law in 1808, inclines to think the pure Latin older than the other. M. Guizot adopts the same opinion (Civilisation en France, Leçon 9.). M. Wraida refers its original enactment to the period when the Franks were still on the left bank of the Rhine; that is, long before the reign of Clovis. And this seems an evident inference from what is said in the prologue to the law, written long afterwards. But of course it cannot apply to those passages which allude to the Romans as subjects, or to Christianity. M. Guizot is of opinion that it bears marks of an age when the Franks had long been mingled with the Roman population. This is consistent with its having been revised by the sons of Clovis, Childebert and Clotaire, as is asserted in the prologue. One manuscript has the words:—"Hoc decretum est apud regem et principes ejus, et apud cunctum populum Christianum qui infra regnum Merwingorum consistunt." Neither Wraida nor Guizot think it older in its present text than the seventh century; and as Dagobert I. appears in the prologue as one reviser, we may suppose him to be the king mentioned in the words just quoted. It is to be observed, however, that two later writers, M. Pertz, in Monumenta Germaniæ Historica, and M. Pardessus, in Mém. de l'Acad. des Inscriptions, vol. xv. (Nouvelle Serie), have entered anew on this discussion, and do not agree with M. Wraida, nor wholly with each other. M. Lehuerou is clearly of opinion that, in all its substance, the Salic

code is to be referred to Germany for its birthplace, and to the period of heathenism for its date. (Institutions Mérovingiennes, p. 83.)

The Ripuarian Franks Guizot, with some apparent reason, takes for the progenitors of the Austrasians; the Salian, of the Neustrians. The former were settled on the left bank of the Rhine, as *Lœti*, or defenders of the frontier, under the empire. These tribes were united under one government through the assassination of Sigebert at Cologne, in the last years of Clovis, who assumed his crown. Such a theory might tend to explain the subsequent rivalry of these great portions of the Frank monarchy, though it is hardly required for that purpose. The Ripuarian code of law is referred by Guizot to the reign of Dagobert; Eccard, however, had conceived it to have been compiled under Thierry, the eldest son of Clovis. (Rec. des Hist. vol. iv.) It may still have been revised by Dagobert. "We find in this," says M. Guizot, "more of the Roman law, more of the royal and ecclesiastical power; its provisions are more precise, more extensive, less barbarous; it indicates a further step in the transition from the German to the Roman form of social life." (Civil. in France, Leçon 10.)

The Burgundian law, though earlier than either of these in their recensions, displays a far more advanced state of manners. The Burgundian and Roman are placed on the same footing; more is borrowed from the civil law; the royal power is more developed. This code remained in force after Charlemagne; but Hincmar says, that few continued to live by it. In the Visigothic laws enacted in Spain, to the exclusion of the Roman, in 642. all the barbarous elements have disappeared; it is the work of the clergy, half ecclesiastical, half imperial.

It has been remarked by acute writers, Guizot and Troja, that the Salic law does not answer the purpose of a code, being silent on some of the most important regulations of civil society. The former adds, that we often read of matters decided "secundum legem Salicam," concerning which we can find nothing in that law. He presumes, therefore, that it is only a part of their jurisprudence.

Troja (Storia d'Italia nel medio evo, v. 8.), quoting Buat for the same opinion, thinks it probable that the Franks made use of the Roman law where their own was defective. It may perhaps be not less probable than either hypothesis, that the judges gradually introduced principles of decision which, as in our common law, acquired the force of legislative enactment. The rules of the Salic code principally relate to the punishment or compensation of crimes; and the same will be found in our earliest Anglo-Saxon laws. The object of such written laws, with a free and barbarous people, was not to record their usages, or to lay down rules which natural equity would suggest, as the occasion might arise, but to prevent the arbitrary infliction of penalties. Chapter lxii. "On Successions," may have been inserted for the sake of the novel provision about Salic lands, which could not have formed a part of old Teutonic customs.

55.

SALIC LANDS.

Edit. 1826, p. 146. Edit. 1841, p. 98.

THE opinion expressed in the text, that the *terra Salica*, which females could not inherit, was the land acquired by the barbarians on their first conquest, is confirmed by Sismondi (i. 196.), and by Guizot (Essais sur l'Hist. de France, p. 94.). M. Guerard, however, the learned editor of the chartulary of Chartres (Documens Inédits, 1840, p. 22.), is persuaded that Salic land was that of the domain, from *sala*, the hall or principal residence, as opposed to the portion of the estate which was occupied by tenants, beneficiary or servile. This, he says, he has proved in another work, which I have not seen. Till I have done so, much doubt remains to me as to this explanation. Montesquieu had already started the same theory, which Guizot, justly as it seems, calls "incomplete et hypothétique." Besides other objections, it seems not to

explain the manifest identity between the *terra Salica* and the *hæreditas aviatica* of the Ripuarian law, or the *alodis parentum* of Marculfus. I ought, however, to mention a remark of Grimm, that, throughout the Frank domination, other countries made use of the word *terra Salica*. In them it could not mean lands of partition or assignment, but mere *alodia*. And he thinks that it may, in most cases, be interpreted of the *terra dominicalis*. (Deutsche Rechts Alterthümer, p. 493.)

M. Fauriel maintains (Hist. de la Gaule Méridion. ii. 18.), that the Salic lands were beneficiary, as opposed to the alodial. But the "hæreditas aviatica" is repugnant to this. Marculfus distinctly opposes *alodia* to *comparata*, and limits the exclusion of daughters to the former. According to one of the most recent inquirers, "terra Salica" was all the land held by a Salian Frank (Lehuerou, i. 86.). But the same objections apply to this solution; in addition to which it may be said that the whole Salic law relates to that people, while "terra Salica" is plainly descriptive of a peculiar character of lands.

56.

BISHOPS.

Edit. 1826, p. 147. Edit. 1841, p. 99.

THE barbarians, by degrees, got hold of bishoprics. In a list of thirty-four bishops or priests, present at a council in 506, says M. Fauriel (iii. 459.), the names are all Roman or Greek. This was at Agde, in the dominion of the Visigoths. In 511, a council at Orleans exhibits one German name. But at the fifth council of Paris, in 577, where forty-five bishops attended, the Romans are indeed much the more numerous, but mingled with barbaric names, six of whom M. Thierry mentions. (Récits des Temps Mérovingiens, vol. ii. p. 183.) In 585, at Macon, out of sixty-three names but six are German. Fauriel asserts that, in a diploma of Clovis II. dated 653, there are but five Roman names out of forty-five witnesses; and

hence he infers that, by this time, the Franks had seized on the Church as their spoil, filling it with barbarian prelates. But on reference to Rec. des Hist. (iv. 636.), I find but four of the witnesses to this instrument qualified as *episcopus*: and of these two have Roman names. The majority may have been laymen for any evidence which the diploma presents. In one, however, of Clovis III., dated 693 (Id. p. 672.), I find, among twelve bishops, only three names which appear Roman. We cannot always judge by the modernisation of a proper name. St. Leger sounds well enough; but in his life we find a "Beatus Leodegarius ex progenie celsa Francorum ac nobilissima exortus." Greek names are exceedingly common among the bishops; but these cannot mislead an attentive reader.

This inroad of Franks into the Church probably accelerated the utter prostration of intellectual power, at least in its literary manifestation, which throws so dark a shade over the seventh century. And it still more unquestionably tended to the secular, the irregular, the warlike character of the higher clergy in France and Germany for many following centuries. Some of these bishops, according to Gregory of Tours, were profligate barbarians.

57.

STATE OF FORMER INHABITANTS.

Edit. 1826, p. 148. Edit. 1841, p. 100.

The position of the former inhabitants, after the conquest of Gaul by the Burgundians, the Visigoths, and the Franks, both relatively to the new monarchies and to the barbarian settlers themselves, is a question of high importance. It has, of course, engaged the philosophical school of the present day, and has led to much diversity of hypotheses. The extreme poles are occupied by M. Raynouard in his "Hist. du Droit Municipal," and by a somewhat earlier writer, Sir Francis Palgrave, who, following the steps of Dubos, bring the two nations, conquerors and conquered, almost to an equality, as the

common subjects of a sovereign who had assumed the prerogatives of a Roman emperor; and, on the opposite side, by Signor Troja*, and by M. Thierry, who finds no closer analogy for their relative conditions than that of the Greeks and Turks in the days that have lately gone by. "It is no more a proof," he contends, "that the Roman natives were treated as free, because a few might gain the favour of a despotic court, than that the Christian and Jew stand on an even footing with the Mussulman, because an Eastern sultan may find his advantage in employing some of either religion." (Lettres sur l'Hist. de France, Lett. vii.) This is is not quite consistent with his language in a later work: "Sous le règne de la première race se montrent deux conditions de liberté: la liberté par excellence, qui est la condition du Franc; et la liberté du second ordre, le droit de cité romaine." (Récits des Temps Mérovingiens, i. 242. — Bruxelles, 1840.)

It is, however, as it seems to me, and as the French writers have generally held, impossible to maintain either of these theories. The Roman "conviva regis" (by which we may perhaps better understand one who had been actually admitted to the royal table, thus bearing an analogy to the Frank Antrustion, than what I have said in the text, one of a rank not unworthy of such an honour†) was estimated in his weregild at half the price of the barbarian Antrustion, the highest known class at the Merovingian court, and above the common alodial proprietor. But between two such landholders the same proportion subsisted; the Frank was valued twice as high as the Roman; but the Roman proprietor was set more than as much above the tributary, or semi-servile husbandman, whose nation is not distinguished by the letter of the Salic code. We have, therefore, in this notorious distinction, subordination with-

* La Storia di Francia sotto i rè della prima razza può dirsi non consistere che negli esempj delle oppressioni de' Franchi sopra i cittadini Romani, e della generosa protezione de' vescovi o Romani o Franchi. (Storia d'Italia, vol. i. part v. p. 421.) This is not borne out by history. We find no oppression of Romans by Franks, though much by Frank kings. The conquerors may have been nationally insolent; but this is not recorded.

† I do not give this as very highly probable: *conviva regis* seems an odd phrase; but it *may* have included all the senatorial families, who evidently made a noble class among the Romans.

out servitude; exactly what the circumstances of the conquest, and the general relation of the barbarians to the empire, would lead us to anticipate, and what our historical records unequivocally confirm. The oppression of the people, which Thierry infers from the history of Gregory of Tours, under Gontran and Chilperic, was on the part of violent and arbitrary princes, not of the Frank nation; nor did the latter by any means escape it. It is true that the civil wars of the early Merovingian kings were most disastrous, especially in Aquitaine, and of course the native inhabitants suffered most; yet this is very distinguishable from a permanent condition of servitude.

"The Romans," Sir F. Palgrave has said, "retained their own laws. Their municipal administration was not abrogated or subverted; and wherever a Roman population subsisted, the barbarian king was entitled to command them with the prerogatives that had belonged to the Roman emperors." (Rise and Progress of the English Commonwealth, vol. i. p. 362.) In this I demur only to the word *entitled*, which seems designed to imply something more than the right of the sword. But this is the right, and I can discern no real evidence of any other, which Clovis, and Clotaire, and Chilperic exercised; very like, of course, to the prerogatives of the Roman emperors, since one despotism must be akin to another; and a provincial of Gaul, whose ancestors had for centuries obeyed an unlimited monarch, could not claim any better privileges by becoming the subject of a conqueror. It is universally agreed, at least I apprehend so, that the Roman, as a mere possessor, and independently of any personal dignity with which he might have been honoured, did not attend the national assemblies in the Field of March; nor had he any business at the *placitum* or *mallus* of the Count among the Rachimburgii, or freeholders, who there determined causes, according to their own jurisprudence, and transacted other business relating to their own nation. The kings were always styled merely "Reges Francorum:" *

* One instance of an apparent exception, for leading me to which I am indebted to Mr. Spence (Laws of Europe, p. 240.), has met my eyes. Dagobert I. calls himself in an instrument, found in Vita Beati Martini, apud

whenever, in Gregory of Tours' history, the popular will is expressed, it is by the Franks; no other nation separately, nor the Franks as blended with any other nation, appear in his pages to have acted for themselves.

It must be almost unnecessary to remind the reader that the word Roman is uniformly applied, especially in the barbarian laws, to the Gaulish subjects of the empire, whose allegiance had been transferred, more or less reluctantly, but always through conquest, to the three barbarian monarchies, two of which were ultimately subverted by the Franks. But it is only in two senses that this can be reckoned a proper appellation; one, inasmuch as privileges of Roman citizenship had been extended to the whole of Gaul by the emperors; and another, as applicable, with more correctness, to that population of Roman or Italian descent, which had gradually settled in the cities. This, during so many ages, must have become not inconsiderable; the long continuance of the same legions in the province, the wealth and luxury of many cities, the comparative security, up to the close of the fourth century, from military revolution and civil war, the facility, perhaps, of purchasing lands, would naturally create a respectable class, to whose highly civilised manners the records of the fourth and fifth centuries especially bear witness.* The Latin language became universal in cities; and if in country villages some remains of the Celtic might linger, they have left very few traces behind.

Sismondi has indeed gone much too far, when he infers, especially from this disuse of the old language, an almost complete extinction of the Gaulish population. And for this he accounts by their reduction to servitude, by the

Duchesne, i. 655., "Rex Francorum et *populi Romani princeps*." The authenticity of this charter deserves to be considered. But, supposing it to be genuine, it does not go a great way towards the imperial style.

* Salvian, in the middle of the fifth century, descants on the beauties of Aquitaine: "Adeo illic omnis admodum regio aut intertexta vineis, aut florulenta pratis, aut distincta culturis, aut consita pomis, aut amœnata lucis, aut irrigata fontibus, aut interfusa fluminibus, aut circumdata messibus erat, ut vere possessores et domini terræ illius non tam soli illius portionem quam paradisi imaginem possedisse videantur." (De Gubernat. Dei, lib. vii. p. 299 edit. 1611.)

exactions of their new lords, and the facility of purchasing slaves in the markets of the empire (vol. i. p. 84.). But such a train of events is wholly without evidence; without at least any evidence that has been alleged. We do not know that the peasantry were ever proprietors of the soil which they cultivated before the Roman invasion, but may much rather believe the contrary from the language of Cæsar — *Plebs pæne servorum habetur loco.* We do not know that they fell into a worse condition afterwards. We do not know that they were oppressed in a greater degree than other subjects of Rome, not surely so as to extinguish the population. We may believe that slaves were occasionally purchased, according to the usage of the empire, without denying the existence of *coloni*, indigenous and personally free, of whom the Theodosian code is so full. Nor is it evident why even serfs may not have been of native, as easily as of foreign origin. All this is presumed by Sismondi, because the Latin language, and not the Celtic, is the basis of French. And a similar hypothesis must, by parity of reasoning, be applied to the condition of Spain during the centuries of Roman dominion. But it is assumed the more readily, through the tendency of this eminent writer to place in the worst light what seldom can be placed in a very favourable one, the social institutions and usages of mankind. The change of language is no doubt remarkable. But we may be deceived by laying too much stress on this single circumstance, in tracing the history of nations. It is very difficult to lay down a rule as to the tendency of one language to gain ground upon another. Some appear in their nature to be aggressive; such is the Latin, and probably the Arabic. But why is it that so much of the Walachian language, it is said, comes from Latin, in consequence of a merely military occupation; while a more lasting possession of Britain (where flourishing colonies were filled with Roman inhabitants, and the natives borrowed in some degree the arts and manners of their conquerors, connected with them also by religion in the latter part of their dominion) did not hinder the preservation of the original Celtic idiom,

with scarcely any infusion of Latin? Why is it that innumerable Arabic words, and even some Arabic sounds of letters, are found in the Castilian language, the language of a people foreign and hostile, while scarcely a trace is left of the Visigothic tongue, that of their fathers; so that for one word, it is said, of Teutonic origin remaining in Spain, there are ten in Italy, and a hundred in France?* If we were to take Sismondi literally, the barbarians must have found nothing in Gaul but a Roman or Romanized aristocracy, surrounded by slaves; and these as much imported, or the offspring of importation, as the Negroes in America. This is rather a humiliating origin, an *illud quod dicere nolo*, for the French nation. For it is the French nation that is descended from the inhabitants of Gaul at the epoch of the barbarian conquest.

We have, however, a strong ethnographical argument against this imaginary depopulation, in the national characteristics of the French. A brilliant and ingenious writer has well called our attention to the Celtic element, that under all the modifications which difference of race, political constitutions, and the stealthy progress of commerce and learning have brought in, still distinguishes the Frenchman: "La base originaire, celle qui a tout reçu, tout accepté, c'est cette jeune molle et mobile race de Gaels, brillante, sensuelle et légère, prompte à apprendre, prompte à dédaigner, avide des choses nouvelles. Voilà l'élément primitif, l'élément perfectible." (Michelet, Hist. de France, i. 156.) This is very good, and we cannot but see the resemblance to the Celtic character. Michelet goes afterwards too far, and endeavours to show that a great part of the French language is Celtic; failing wholly in his quotations from early writers, which either relate to the period immediately subsequent to the Roman conquest, or to the *lingua Romana rustica* which ultimately became French. It is nevertheless true that a certain number of Celtic words have been retained in French, as has been shown even of Visigothic by M. Fauriel. He has found

* Edinb. Review, vol. xxxi. p. 109.

3000 words in Provençal, which are not Latin. All of these which are not Gothic, Iberian, Greek, or Arabic, may be reckoned Celtic; and though the former languages can have left few traces in northern French, we may presume the last to have been retained in a scarcely less degree. (Ampère, Hist. Litt. de la France, vol. i. p. 34.) Many French monosyllables are Celtic. But if we try to read any French of the twelfth century, we shall feel no doubt, that a vast majority of words are derived from the Latin; and it may be added that the terms of rural occupation, and generally of animals, are full as much Latin as those more familiar in towns.

The cities of Gaul were occupied probably by a more mingled population than the villages. In the cities dwelt the more ancient and wealthy families, called senators, and distinct, as far as we can see our way in a very perplexed inquiry, from the ordinary *curiales*, or decurions. It is true that these also are sometimes called senators; but the word has not, as Guizot observes (Collect. des Mémoires, i. 247.), in Gregory and other writers, a precise sense. Families were often elevated to the senatorial rank by the emperors, which gave their members the title of *clarissimi*; and these were probably meant by Gregory, in the expression *è primis Galliarum senatoribus*, which naturally must be rendered—'of the first Gaulish nobility.' The word is several times employed by him in what seems the same sense. It is, however, also used, as Guizot and Raynouard think, for the highest class of *curiales* who had served municipal offices. But more will be said of this in another note.

Sismondi has remarked (i. 198.), that in the lives of the saints, during the Merovingian period, most part of whom were of Roman descent, it is generally mentioned that they were of good family. The Church afforded the means of preserving their respectability; and thus (without much weight in the monarchy, and often with diminished patrimony, but in return less oppressed by taxation than under the imperial fisc, deriving also a reflected importance from the bishop when he was a Roman, and shel-

tered by his protection) this class of the native inhabitants held not only a free but an honourable position. Yet this was still secondary. In a free commonwealth the exclusion from political rights, by a broad line of legal separation, brings with it an indelible sense of inferiority. But this inferiority is not allowed by all our inquirers.

"The nations who were unequal before the law, soon became equal before the sovereign, if not in theory yet in practice; and the children of the companions of Clovis were subjected, with few and not very material exceptions, to the same positive dominion as the descendants of the pro-consul or the senator. It is not difficult to form plausible conjectures concerning the causes of this equalisation; nor are the means by which it was effected entirely concealed. Considered in relation to the Romans, the Franks, for we will continue to instance them, constituted a distinct state; but, compared to the Romans, a very small one; and the individuals composing it, dispersed over Gaul, were almost lost among the tributaries. Experience has shown, that whenever a lesser or poorer dominion is conjoined in the person of the same sovereign, to a greater or more opulent one, the minuter mass is always in the end subjugated by the larger." (Rise and Progress of the English Commonwealth, vol. i. p. 363.)

Such is, in a few words, the view taken of the Merovingian history by a very learned writer, Sir F. Palgrave. And, doubtless, the concluding observation is just, in the terms wherein he expresses it. But there seems a fallacy in applying the word "poorer" to the Franks, or any barbarian conquerors of Gaul. They were poorer before their conquest; they were richer afterwards. At the battle of Hastings, the balance of wealth was, I doubt not, on the side of Harold more than of William; but twenty years afterwards, Domesday Book tells us a very different story. If an allotment was made among the Franks, or if they served themselves to land without any allotment, on either hypothesis they became the great proprietors of northern France; and on whom else did the beneficiary donations, the rewards of faithful Antrustions, generally devolve? It

is perfectly consistent with the national superiority of the Franks in the sixth and seventh centuries, that in the last age of the Carlovingian line, when the distinction of laws had been abolished or disused, the more numerous people should, in many provinces, have (not, as Sir F. P. calls it, subjugated but) absorbed the other. We find this to have been the case at the close of the Anglo-Norman period at home.

One essential difference is generally supposed to have separated the Frank from the Roman. The latter was subject to personal and territorial taxation. Such had been his condition under the empire; and whether the burthen might or not be equal in degree (probably it was not such), it is not at all reasonable to believe without proof, that he was ever exempted from it. It is, however, true that some French writers have assumed all territorial impositions on free landholders to have ceased after the conquest. (Récits des Temps Méroving. i. 268.*) This controversy I do not absolutely undertake to determine; but the proof evidently lies on those who assert the Roman to have been more favoured than he was under the empire; when all were liable to the land-tax, though only those destitute of freehold possessions paid the capitation or *census*. We cannot infer such a distinction on the ground of tenure from a passage of Gregory (lib. ix. c. 30.):—"Childebertus verò rex descriptores in Pictavos, invitante Marovio episcopo, jussit abire; id est, Florentianum majorem domûs regiæ, et Romulfum palatii sui comitem, ut scilicet populus censum quem tempore patris functi fuerant, facta ratione innovaturæ, reddere deberet. Multi enim ex his defuncti fuerant, et ob hoc viduis orphanisque ac debilibus tributi pondus inciderat. Quod hi discutientes per ordinem, relaxantes pauperes ac infirmos, illos quos justitiæ conditio tributarios dabat, censu publico subdiderunt." These collectors were repelled by the ci-

* M. Lehuerou imputes the same theory to Montesquieu. But his words (Espr. des Loix, xxx. 13.) do not assert that the Romans might not be subject to taxation in the earlier Merovingian period; though afterwards, as he supposes, this obligation was replaced by that of military service.

tizens of Tours, who proved that Clotaire I. had released their city from any public tribute, out of respect for St. Martin. And the reigning king acquiesced in this immunity. It may also be inferred from another passage (Lib. x. c. 7.), that even ecclesiastical property was not exempt from taxation, unless by special privilege, which indeed seems to be implied in the many charters conceding this immunity, and in the forms of Marculfus.*

It seems, however, clear that the Frank landholder, the *Francus ingenuus*, born to his share, according to old notions, of national sovereignty, gave indeed his voluntary donation annually to the king, but reckoned himself entirely free from compulsory tribute. We read of no tax imposed by the assemblies of the Field of March; and if the kings had possessed the prerogative of levying money at will, the monarchy must have become wholly absolute without opposition. The barbarian was distinguished by his abhorrence of tribute. Tyranny might strip one man of his possessions, banish another from his country, destroy the life of a third; the rest would at the utmost murmur in silence; but a general imposition on them as a people was a yoke under which they would not pass without resistance. I shall mention a few instances in a future note. The Roman, on the other hand, complained doubtless of new or unreasonable taxation; but he could not avoid acknowledging a principle of government to which his forefathers had for so many ages submitted. The house of Clovis stood to him in place of the Cæsars;

* This note was written before I had looked at a work published in 1843, by M. Lehuerou, "Histoire des Institutions Mérovingiennes," in which, with much impartiality and erudition, he draws a line between the theories of Dubos and Montesquieu; and, upon this particular subject of taxation, clearly proves, in my opinion, that the land-tax imposed under the empire, continued to be levied on the Roman subjects of Clovis and the next two generations. (Vol. i. p. 271, *et post.*) The Franks, such as were *ingenui*, were originally exempt from this and all other tribute. Of this M. Lehuerou makes no doubt; nor, perhaps, has any one doubted it, except Dubos. But, under the sons and grandsons of Clovis, endeavours were made, to which I have drawn attention in a subsequent note, by those despotic princes, eager to assume the imperial prerogatives over all their subjects, to rob them of their national immunity; and a struggle of the German aristocracy ensued, which annihilated the personal authority of the sovereign. (Hist. des Inst. Méroving. i. 425, *et post.*)

this part of the theory of Dubos cannot be disputed. But when that writer extends the same to the Frank, as a constitutional position, and not merely referring to acts protested against as illegal, the voice of history refutes him.

Dubos has asserted, and is followed by many, that the army of Clovis was composed of but a few thousand Salian Franks. And for this the testimony of Gregory has been adduced, who informs us only that 3000 of the army of Clovis, which a later writer calls 6000, were baptized with him. (Greg. Tur. lib. ii. c. 33.) But Clovis was not the sole chieftain of his tribe. It has been seen that he enlarged his command towards the close of his life, by violent measures with respect to other kings as independent apparently as himself, and some of whom belonged to his family. Thus the Ripuarian Franks, who occupied the left bank of the Rhine, came under his sway. And besides this, the argument from the number of soldiers baptized with Clovis assumes that the whole army embraced Christianity with their king. It is true that Gregory seems to imply this. But, even in the seventh century, the Franks on the Meuse and Scheldt were still chiefly pagan, as the Lives of the Saints are said by Thierry to prove. We have only, it is to be remembered, a declamatory and superficial history for this period, derived, as I believe, from the panegyrical life of St. Remy, and bearing traces of legendary incorrectness and exaggeration. We may, however, appeal to other criteria.

It cannot be too frequently inculcated on the reader who desires to form a general, but tolerably exact, notion of the state of France under the first line of kings, that he is not hastily to draw inferences from one of the three divisions, Austrasia, Neustria, and Aquitaine, to which, for a part of the period, we must add Burgundy, to the rest. The difference of language, though not always decisive, furnishes a presumption of different origin. We may therefore estimate, with some probability, the proportion of Franks settled in the monarchy on the left bank of the Rhine, by the extent of country wherein the Teutonic language is spoken, unless we have reason to suspect

that any change in the boundaries of that and the French has since taken place. The Latin was certainly an encroaching language, and its daughter has in some measure partaken of the same character. Many causes are easy to assign, why either might have gained ground on two dialects, the German and Flemish, contiguous to it on the eastern frontier, while we can hardly perceive one for an opposite result. We find, however, that both have very nearly kept their ancient limits. It has been proved by M. Raoux, in the Memoirs of the Academy of Brussels (vol. iv. p. 411.), that few towns or villages have changed their language since the ninth century. The French or Walloon followed in that early age the irregular line which, running from Calais and St. Omer to Lisle and Tournay, stretches north of the Meuse as far as Liege, and bending thence to the south-westward, passes through Longwy to Metz. These towns speak French, and spoke it under Charlemagne, if we can say that under Charlemagne French was spoken anywhere; at least they spoke a dialect of Latin origin. The exceptions are few; but where they exist, it is from the progress of French rather than the contrary. A writer of the sixteenth century says of St. Omer, that it was "Olim haud dubie mere Flandricum, deinde tamen bilingue, nunc autem in totum fere Gallicum." There has also been a slight movement toward French in the last fifty years.

The most remarkable evidence for the duration of the limit is the act of partition between Lothaire of Lorrain and Charles the Bald, in 870, whence it appears that the names of places where French is now spoken were then French. Yet most of these had been built, especially the abbeys, subsequently to the Frank conquest; "d'où on peut conclure, que même dans le période franque, le langage vulgaire du grand nombre des habitans du pays, qui sont présentement Wallons, n'était pas teutonique; car on en verrait des traces dans les actes historiques et géographiques de ce temps-là." (p. 434.) Nothing, says M. Michelet, can be more French than the Walloon country. (Hist. de France, viii. 287.) He expatiates almost with en-

thusiasm on the praise of this people, who seem to have retained a large share of his favourite Celtic element. It appears that the result of an investigation into the languages on the Alsatian frontier would be much the same. Here, therefore, we have a very reasonable presumption, that the forefathers of the Flemish Belgians, as well as of the people of Alsace, were barbarians; some of the former may be sprung from Saxon colonies planted in Brabant by Charlemagne; but we may derive the majority from Salian and Ripuarian Franks. These were the strength of Austrasia, and among these the great restorer of the empire fixed his capital at Aix-la-Chapelle.

In Aquitaine, on the other hand, everything appears Roman, in contradistinction to Frank, except the reigning family. The chief difficulty therefore concerns Neustria; that is, from the Scheldt to the Loire; and to this important kingdom the advocates of the two nations, Roman and Frank, lay claim. M. Thierry has paid much attention to the subject, and come to the conclusion, that in the seventh century the number of Frank landholders, from the Rhine to the Loire, much exceeded that of the Roman. And this excess he takes to have been increased through the seizure of Church lands in the next age, by Charles Martel, who bestowed them on his German troops enlisted beyond the Rhine. The method which Thierry has pursued, in order to ascertain this, is ingenious and presumptively right. He remarked that the names of places will often indicate whether the inhabitants, or more often the chief proprietor, were of Roman or Teutonic origin. Thus Franconville and Romainville, near Paris, are distinguished in charters of the ninth century, as *Francorum villa*, and *Romanorum villa*. This is an instance where the population seems to have been of different race. But commonly the owner's christian name is followed by a familiar termination. In that same neighbourhood proper names of German origin, with the terminations *ville*, *court*, *mont*, *val*, and the like, are very frequent. And this he finds to be generally the case north of the Loire, compared with the left bank of that river. It is of course to be un-

derstood, that this proportion of superior landholders did not extend to the general population. For that, in all Neustrian France, was evidently composed of those who spoke the rustic Roman tongue; the corrupt language which, in the tenth or eleventh century, became worthy of the name of French; and this was the case, as we have just seen, in part of Austrasia, as Champagne and Lorrain.

We may therefore conclude that the Franks, even in the reign of Clovis, were rather a numerous people; including, of course, the Ripuarian as well as the Salian tribe. They certainly appear in great strength soon afterwards. If we believe Procopius, the army which Theodebert, king only of Austrasia, led into Italy, in 539, amounted to 100,000. And admitting the probability of great exaggeration, we could not easily reconcile this with a very low estimate of Frank numbers. But, to say the truth, I do not rely much on this statement. It is at all events to be remembered, that the dominions of Theodebert, on each side of the Rhine, would furnish barbarian soldiers more easily than those of the western kingdoms. Some may conjecture that the army was partly composed of Romans; yet it is doubtful whether they served among the Franks at so early a period, though we find them some years afterwards under Chilperic, a Neustrian sovereign. The armies of Aquitaine, it is said, were almost wholly composed of Romans or Goths; it could not have been otherwise.

The history of Gregory, which terminates in 598, affords numerous instances of Romans in the highest offices, not merely of trust but of power. Such were Celsus, Amatus, Mummolus, and afterwards Protadius in Burgundy, and Desiderius in Aquitaine. But in these two parts of the monarchy we might anticipate a greater influence of the native population. In Neustria and Austrasia, the Roman count, or mayor of the palace, might have been unfavourably beheld. Yet in the latter kingdom, all Frank as it was in its general character, we find, even before the middle of the sixth century, Lupus, duke of Champagne, a man of considerable weight, and a

Roman by birth; and it was the policy afterwards of Brunehaut to employ Romans. But this not only excited the hostility of the Austrasian Franks, but of the Burgundians themselves; nor did any thing more tend to the ruin of that ambitious woman. Despotism, through its most ready instruments, was her aim; and when she signally failed in the attempt, the star of Germany prevailed. From that time, Austrasia at least, if not Neustria, became a Frank aristocracy. We hear little more of Romans, ecclesiastics excepted, in considerable power.

If, indeed, we could agree with Montesquieu and Mably, that a Roman subject might change his law and live by the Salic code at his discretion, his equality with the Franks would have been virtually recognised; since every one might place himself in the condition of the more favoured nation. And hence Mably accounts for the prevalence of the Frank jurisprudence in the north of France; since it was more advantageous to adopt it as a personal law. The Roman might become an alodial land-holder, a member of the sovereign legislature in the Field of March. His *weregild* would be raised, and with that his relative situation in the commonwealth; his lands would be exempt from taxation. But this theory has been latterly rejected. We cannot indeed conceive one less consonant to the principles of the barbarian kingdoms, or the general language of the laws. Montesquieu was deceived by a passage in an early capitulary, of which the best manuscripts furnish a different reading. Mably was pleased with an hypothesis, which rendered the basis of the state more democratical. But the first who propagated this error, and on more plausible grounds than Montesquieu, though he (Esprit des Loix, liv. xxviii. c. 4.) seems to claim it as a discovery of his own, were Ducange and Muratori. They were misled by an edict of the emperor Lothaire I. in 824, which I have also erroneously quoted for the same purpose: —"Volumus ut cunctus populus Romanus interrogetur quali lege vult vivere, ut tali, quali professi fuerint vivere velle, vivant." But Savigny has proved that this was a peculiar exception of favour granted at that time to the Romans,

or rather separately to each person; and that not as a privilege of the ancient population, but for the sake of the barbarians who had settled at Rome. Raynouard is one of those who have been deceived by the more obvious meaning of this law, and adopts the notion of Mably on its authority. Were it even to bear such an interpretation, we could not draw a general inference from it. In the case of married women, or of the clergy, the liberty of changing the law of birth was really permitted. (See Savigny, i. 134, *et post*, Engl. transl.)

It should, however, be mentioned, that a late very learned writer, Troja, admits the hypothesis of a change of law in France, not as a right in every Roman's power, but as a special privilege sometimes conceded by the king. And we may think this conjecture not unworthy of regard; since it serves to account for what is rather anomalous, the admission of mere Romans, at an early period, to the great offices of the monarchy, and especially to that of count, which involved the rank of presiding in the Frank *mallus*. It is said that Romans sometimes assumed German names, though the contrary never happened; and this of itself seems to indicate a change, as far as was possible, of national connexion. But it is of little service to the hypothesis of Montesquieu and Mably. Of the edict of Lothaire Troja thinks like Savigny; but he adopts the reading of the capitulary, as quoted by Montesquieu, "Francum, aut barbarum, *aut* hominem qui lege Salicâ vivit;" where the best manuscripts omit the second *aut*.

58.

PERSONAL LAWS.

Edit. 1826, p. 148. Edit. 1841, p. 101.

THIS subject has been fully treated in the celebrated work by Savigny, "History of Roman Law in the Middle Ages." The diligence and fidelity of this eminent writer have been acknowledged on all sides; nor has any one been so

copious in collecting materials for the history of mediæval jurisprudence, or so perspicuous in arranging them. In a few points, later inquirers have not always concurred with him. But, with the highest respect for Savigny, we may say, that of the two leading propositions; namely, first, the continuance of the Theodosian code, copied into the Breviarium Aniani, as the personal law of the Roman inhabitants, both of France and Italy, for several centuries after the subjugation of those countries by the barbarians; and secondly, the quotation of the Pandects and other parts of the law of Justinian by some few writers, before the pretended discovery of a manuscript at Amalfi, the former has been perfectly well known, at least ever since the publication of the glossary of Ducange in the seventeenth century, and that of Muratori's Dissertations on Italian Antiquities in the next; nor indeed could it possibly have been overlooked by any one who had read the barbarian codes, full as they are of reference to those who followed the laws of Rome; while the second is also proved, though not so abundantly, by several writers of the last age. Guizot, praising Savigny for his truthfulness, and for having shown the permanence of Roman jurisprudence in Europe, well asks how it could ever have been doubted. (Civil. en France, Leçon 11.)

A late writer indeed has maintained, that the Romans did not preserve their law under the Lombards; elaborately repelling the proofs to the contrary, alleged by Muratori and Savigny. (See Troja, Discorso della Condizione dei Romani vinti dai Longobardi, subjoined to the fourth volume of his Storia d'Italia.) He does not admit that the inhabitants were treated by the Lombard conquerors as any thing better than tributaries or *coloni*. Even the bishops and clergy were judged according to the Lombard law (vol. v. p. 86.). The personal law did not come in till the conquest of Charlemagne, who established it in Italy. And though later, according to this writer, in its origin, the distinctions introduced by it subsisted much longer than they did in France. Instances of persons professing to live by the Lombard law are found very

late in the middle ages; the last is at Bergamo, in 1388. But Bergamo was a city in which the Lombard population had predominated. (Savigny, vol. i. p. 378.)

Whatever may have been the case in Lombardy, the existence of personal law in France is beyond question. It is far more difficult to fix a date for its termination. These national distinctions were indelibly preserved in the south of France by a law of Valentinian III., copied into the Breviarium Aniani, which prohibited the intermarriage of Romans with barbarians. This was abolished so far as to legalise such unions, with the permission of the count, by a law of the Visigoths in Spain, between 653 and 672. But such an enactment could not have been obligatory in France. Whether the Franks ever took Roman wives, I cannot say; we have, as far as I am aware, no instance of it in their royal family. Proofs might, perhaps, be found, with respect to private families, in the Lives of the Saints; or, if none, presumptions to the contrary. Troja (Storia d'Italia, p. 1204.) says, that St. Medard was the offspring of a marriage between a Frank and a Roman mother, before the conquest by Clovis, and that the father lived in the Vermandois. Savigny observes, that the prohibition could only have existed among the Visigoths; else a woman could not have changed her law by marriage. This, however, seems rather applicable to Italy than to the north of France, where we have no proof of such a regulation. Raynouard, whose constant endeavour is to elevate the Roman population, assumes that they would have disdained intermarriage with barbarians. (Hist. du Droit Municipal, i. 288.) But the only instance which he adduces, strangely enough, is that of a Goth with a Frank; which, we are informed, was reckoned to disparage the former. It is very likely, nevertheless, that a Frank Antrustion would not have held himself highly honoured by an alliance with either a Goth or a Roman. Each nation had its own pride; the conqueror in arms and dominion, the conquered in polished manners and ancient renown.

"At the beginning of the ninth century," says M.

Guizot, "the essential characteristic is that laws are personal and not territorial. At the beginning of the eleventh, the reverse prevails, except in a very few instances." (Leçon 25.) But can we approximate no nearer? The territorial *element*, to use that favourite word, seems to show itself in an expression of the edict of Pistes, 864: "In iis regionibus quæ legem Romanam sequuntur." (Capit. Car. Calvi.) This must be taken to mean the south of France, where the number of persons who followed any other law, may have been inconsiderable, relatively to the rest, so that the name of the district is used collectively for the inhabitants. (Savigny, i. 162.) And this became the *pays du droit écrit*, bounded, at least in a loose sense, by the Loire, wherein the Roman was the common law down to the French revolution; the laws of Justinian, in the progress of learning, having naturally taken place of the Theodosian. But in the same capitulary we read: "De illis qui secundum legem Romanam vivunt, nihil aliud nisi quod in iisdem continetur legibus, definimus." And the king (Charles the Bald) emphatically declares, that neither that nor any other capitulary, which he or his predecessors had made, is designed for those who obeyed the Roman law. The fact may be open to some limitation; but we have here an express recognition of the continuance of the separate races. It seems highly probable, that the interference of the bishops, still in a great measure of Roman birth, and, even where otherwise, disposed to favour Roman policy, contributed to protect the ancient inhabitants from a legislature wherein they were not represented. And this strongly corroborates the probability that the Romans had never partaken of the legislative power in the national assemblies.

In the middle of the tenth century, however, according to Sismondi, the distinction of races was lost; none were Goths, or Romans, or even Franks, but Aquitanians, Burgundians, Flemings. French had become the language of the nation (iii. 400.). French must here be understood to include Provençal, and to be used in opposition to German. In this sense the assertion seems to be nearly true;

and it may naturally have been the consequence, that all difference of personal laws had come to an end. The feudal customs, the local usages of counties and fiefs, took as much the lead in northern France as the Roman code still preserved in the south. The *pays coutumiers* separated themselves by territorial distinctions from the *pays du droit.** Still the instance quoted in my original note from Vaissette (where at Carcassonne, so late as 918, we find Roman, Goth, and Frank judges enumerated), is a striking evidence that, even far to the south, the territorial principle had not yet wholly subverted those privileges of races, to which the barbarians, and also the Romans, clung as honourably distinctive.

It is only by the force of very natural prejudices, acting on both the polished and the uncivilised, that we can account for the long continuance of this inconvenient separation. If the Franks scorned the complex and wordy jurisprudence of Rome, it was just as intolerable for a Roman to endure the rude usages of a German tribe. The traditional glory of Rome, transferred by the adoption of that name to the provincials, consoled them in their subjection; and in the continuance of their law, in the knowledge that it was the guarantee of their civil rights against a litigious barbarian, though it might afford them but imperfect security against his violence, in the con-

* A work, which I had not seen when this note was written, "Histoire du Droit Français," by M. Laferrière (p. 85.) treats at some length the origin of the customary law of France. It was not, in any considerable degree, borrowed from the barbaric codes, nor greatly, as he thinks, from the Roman law. He points out the manifold discrepancies from the former of these. But these codes appear to have been in force under Charlemagne. The feudal customs, which became the sole law on the right bank of the Loire, he refers to the ninth and two following centuries. And I suppose there can be no doubt of this. The spirit of the French customs, both territorial and personal, was wholly feudal; the Salic code had been compiled on a different *motive* or leading principle. This is very much what took place in England, and perhaps more rapidly, in the twelfth century; the Norman law, with its feudal principle, replaced the Anglo-Saxon.

But a Belgian writer, M. Raepsaet (Nouveaux Mémoires de l'Académie de Bruxelles, t. iii.), contends that the Salic and Ripuarian laws had authority in the Netherlands, down to the thirteenth century, for towns and for alodial proprietors. We find lex Salica in several instruments: Otho of Frisingen says, "Lege quæ Salica usque ad hæc tempora vocatur, nobilissimos Francorum adhuc uti." But this must have been chiefly as to successions.

nexion which it strengthened with the Church (for churchmen of all nations followed it), they found no trifling recommendations of this distinction from the conquerors. It seems to be proved that, in lapse of ages, each had gradually borrowed something from the other. The melting down of personal into territorial, that is, uniform law, as it cannot be referred to any positive enactment or to any distinct period, seems to have been the result of such a process. The same judges, the counts and *missi*, appear to have decided the controversies of all the subject nations, whether among themselves or one with another. Marculfus tells us this in positive terms: "Eos recto tramite secundum legem et consuetudinem eorum regas." (Marculf. Formulæ, lib. i. c. 8.) Nor do we find any separate judges, except the *defensores* of cities, who were Romans, but had only a limited jurisdiction. It was only as to civil rights, as ought to be remarked, that the distinction of personal law was maintained. The penalties of crime were defined by a law of the state. And the same must of course be understood as to military service.

59.

GRAF.

Edit. 1826, p. 150. Edit. 1841, p. 101.

THE word *graf* was not always equivalent to *comes;* it took in some countries, as in England, the form *gerefa*, and stood for the *vicecomes* or sheriff, the count or alderman's deputy. Some have derived it from *grau*, on the hypothesis that the elders presided in the German assemblies.

60.

HEREDITARY OFFICES.

Edit. 1826, pp. 151. and 166. Edit. 1841, pp. 102. and 112.

THE German dukes of the Alemanni and Bavarians belonged to once royal families; their hereditary rights may be considered as those of territorial chiefs. Again, in Aquitaine the Merovingian kings had so little authority that the counts became nearly independent. But we do not find reason, as far as I am aware, to believe any regular succession of a son to his father, in Neustria or Austrasia, under the first dynasty; much less would Charlemagne have permitted it to grow up. It could never have become an established usage, except in a monarchy too weak to maintain any of its prerogatives. Such a monarchy was that of Charles the Bald. I have said that, in the famous capitulary of Kiersi, in 877, the succession of a son to his father appears to be recognised as a known usage. M. Fauriel, on the other hand, denies that this capitulary even confirms it at all. (Hist. de la Gaule Méridionale, iv. 383.) We both, therefore, agree against the current of French writers who take this for the epoch of hereditary succession. It seems evident to me, that an *usage*, sufficient, in common parlance, to entitle the son to receive the honour which his father had held, is implied in this capitulary. But the object of the enactment was to provide for the contingency of a territorial government becoming vacant by death, during the intended absence of the emperor Charles in Italy; and that in cases only where the son of the deceased count should be with the army, or in his minority, or where no son survived. "It is obvious," Palgrave says, "that the law relates to the custody of the county or fief, during the interval between the death of the father and the investiture of the heir." (English Commonwealth, 392.) But the case of a heir, that is, a son — for collateral inheritance is excluded by

the terms of the capitulary — being of full age and on the spot, is not specially mentioned; so that we must presume that he would have assumed the government of the county, awaiting the sovereign's confirmation on his return from the Italian expedition. The capitulary should be understood as applicable to temporary circumstances, rather than as a permanent law. But I must think that the lineal succession is taken for granted in it.*

We find that, so long at least as the kings retained any power, their confirmation or consent was required on every succession to an honour, that is, a county or other government; though it was very rarely refused. Guadet (Notices sur Richer, p. 62.) supposes this to have been the case even in the last reigns of the Caroline family, that is, in the tenth century; but this is doubtful, at least as to the southern dukes and counts. These honours gradually, after the accession of the house of Capet, assumed a new character, and were confounded together with benefices under the general name of fiefs of the crown. The counts indeed, according to Montesquieu and to probability, held beneficiary lands attached to their office. (Esprit des Loix, xxvi. 27.)

The county, it may here be mentioned, was a territorial division, generally of the same extent as the *pagus* of the Roman empire. The latter appellation is used in the Merovingian period, and long afterwards. The word county, *comitatus*, is said to be rare before 800; but the royal officer was called *comes* from the beginning. The number of *pagi*, or counties, I have not found. The episcopal dioceses were 118 in the Caroline period, and were

* Si comes obierit, cujus filius nobiscum sit, filius noster cum cæteris fidelibus nostris ordinet de his qui illi plus familiares et propinquiores fuerint, qui cum ministerialibus ipsius comitatus et episcopo ipsum comitatum prævideat, usque cum nobis renuntietur. Si autem filium parvulum habuerit, iisdem cum ministerialibus ipsius comitatûs et episcopo, in cujus parochia consistit, eundem comitatum prævideat, donec ad nostram notitiam perveniat. Si vero filium non habuerit, filius noster cum cæteris fidelibus nostris ordinet, qui cum ministerialibus ipsius comitatûs et episcopo ipsum comitatum prævideat, donec jussio nostra inde fiat. Et pro hoc nullus irascatur, si eundem comitatum alteri, qui nobis placuerit dederimus, quam illi qui eam hactenus prævidit. Similiter et de vassallis nostris faciendum est. (Script. Rer. Gall. vii. 701.)

frequently, but not always, coincident in extent with the civil divisions. (See Guerard, Cartulaire de Chartres, Prolégomènes, p. 6. in Documens Inédits, 1840.)

61.

PATRICIAN.

Edit. 1826, p. 151. Edit. 1841, p. 101.

THIS office was, as far as I recollect, confined to the kingdom of Burgundy. But the Franks of this kingdom may have borrowed it from the Burgundians, as the latter did from the empire. Marculfus gives a form for the grant of the office of patrician, which seems to have differed only in local extent of authority from that of a duke or a count, which was the least of the three; as the same formula expressing their functions is sufficient for all.

62.

HEREDITARY SUCCESSION.

Edit. 1826, p. 152. Edit. 1841, p. 103.

IT would now be admitted by the majority of French antiquaries, that the nearest heir would not have a strict right to the throne; but if he were of full age, and in lineal descent, his expectation would be such as to constitute a moral claim never to be defeated or contested, provided no impediment, such as his minority or weakness of mind, stood in the way. After the middle of the seventh century, the mayors of the palace selected whom they would. As it is still clearer from history that the Carlovingian kings did not assume the crown without an election, we may more probably suppose this to have been the ancient constitution. The passages in Gregory of Tours, which look like a mere hereditary succession, such as, *Quatuor filii regnum accipiunt, et inter se æquâ lance*

dividunt, do not exclude a popular election, which he would consider a mere formality, and which in that case must have been little more.

I must admit, however, that M. Guizot, whose authority is deservedly so high, gives more weight to lineal inheritance than many others have done; and consequently treats the phrases of historians seeming to imply a choice by the people, as merely recognitions of a legal right. "The principle of hereditary right," he says, "must have been deeply implanted when Pepin was forced to obtain the pope's sanction, before he ventured to depose the Merovingian prince, obscure and despised as he was." (Essais sur l'Hist. de France, p. 298.) But surely this is not to the point. Childeric III. was a reigning king; and, besides this, the question is by no means as to the right of the Merovingian family to the throne, which no one disputes, but as to that of the nearest heir. The case was the same with the second dynasty. The Franks bound themselves to the family of Pepin, not to any one heir within it.

63.

ROYAL AUTHORITY.

Edit. 1826, p. 155. Edit. 1841, p. 105.

A RECONSIDERATION of the Merovingian history has led me to doubt whether I may not, like several others, have rather exaggerated the change in the prerogative of the French kings from Clovis to Clotaire II. Though the famous story of the vase of Soissons is not insignificant, it now seems to me that an excessive stress has sometimes been laid upon it. In the first place, there is a general objection to founding a large political theory on any anecdote, which proving false, the whole would crumble for want of a basis. This, however, is rather a general remark than intended to throw doubt upon the story told by Gregory of Tours, who, though he came so

long afterwards, and though there is every appearance of rhetorical exaggeration and inexactness in the detail, is likely to have learned the principal fact by tradition or some lost authority.* But even taking the circumstances exactly according to his relation, do they go much farther than to inform us what our knowledge of barbarian manners might lead any one to presume, that the booty obtained by a victory was divided among the army? Clovis was not refused the vase which he requested; the army gave their assent in terms which Gregory, we may well believe, has made too submissive; he took it without regard to the insolence of a single soldier, and revenged himself on the first opportunity. The Salian king was, I believe from other evidence, a limited one; he was obliged to consult his army in war, his chief men in peace; but the vase of Soissons does not seem to warrant us in deeming him to have been more limited than from history and analogy we should otherwise infer. If indeed the language of Gregory were to be trusted, the whole result would tell more in favour of the royal authority than against it. And thus Dubos, who has written on the principle of believing all that he found in history to the very letter, has interpreted the story.

Two French writers, the latter of considerable reputation, Boulainvilliers and Mably, have contributed to render current a notion that the barbarian kings, before the conquest of Gaul, enjoyed scarcely any authority beyond that of leaders of the army. And this theory has lately been maintained by two of our countrymen, whose researches have met with great approbation. "It is plain," says Mr. Allen, "the monarchical theory cannot have been derived from the ancient Germans. In the most considerable

* Since this sentence was written I have found the story of the vase of Soissons in Hincmar's Life of St. Remi, which, as I have observed in a former note, appears to be taken from a document nearly contemporary with the saint, that is, with Clovis. And this original Life of St. Remi, preserved only in extracts when Hincmar compiled his own biography of that famous bishop, is, in all likelihood, the basis of whatever Gregory of Tours has recorded concerning the founder of the monarchy; very rhetorical, and probably not accurate, but essentially deserving belief.

of the German tribes the form of government was republican. Some of them had a chief, whom the Romans designated with the appellation of king; but his authority was limited, and in the most distinguished of their tribes the name as well as the office of king was unknown.* The supreme authority of the nation resided in the freemen of whom it was composed. From them every determination proceeded which affected the general interests of the community, or decided the life or death of any member of the commonwealth. The territory of the state was divided into districts, and in every district there was a chief who presided in its assemblies, and, with the assistance of the other freemen, regulated its internal concerns, and in matters of inferior importance administered justice to the inhabitants.

This form of government subsisted among the Saxons of the Continent so late as the close of the seventh century, and probably continued in existence till their final conquest by Charlemagne. Long before that period, however, the tribes that quitted their native forests, and established themselves in the empire, had converted the temporary general of their army into a permanent magistrate, with the title of king. But that the person decorated with this appellation was invested with the attributes essential to royalty in after times, is utterly incredible. Freemen with arms in their hands, accustomed to participate in the exercise of the sovereign power, were not likely without cause to divest themselves of that high prerogative, and transfer it totally and inalienably to their general. Chiefs who had been recently his equals, might, in consideration of his military talents, and from regard to their common interest, acquiesce in his permanent superiority as commander of their united forces; but it cannot be supposed that they would gratuitously and universally submit to him as their master. There are no written accounts, it is true, of the conditions stipulated by the German war-

* This is by no means an unquestionable representation of what Tacitus has said; but the language of that historian, as has been observed in a former note, is not sufficiently perspicuous on this subject of German royalty.

riors when they converted him into a king. But there is abundance of facts recorded by historians, which show beyond a doubt that, though he might occasionally abuse his power by acts of violence and injustice, the authority he possessed by law was far from being unlimited. (Inquiry into the Rise and Growth of Royal Prerogative, p. 11.)

It may be observed, in the first place, that Mr. Allen appears to have combated a shadow. Few, I presume, contend for an unlimited authority of the Germanic kings, either before or after their conquests of France and England. A despotic monarchy was utterly uncongenial to the mediæval polity. Sir F. Palgrave follows in the same direction : —

"When the 'three tribes of Germany' first invaded Britain, royalty, in our sense of the term, was unknown to them. Amongst the Teutons in general the word 'king,' probably borrowed from the Celtic tongue, though now naturalised in all the Teutonic languages, was as yet not introduced or invented. Their patriarchal rulers were their 'aldermen,' or seniors. In 'old Saxony' there was such an alderman in every pagus. Predominant or pre-eminent chieftains, whom the Romans called 'reges,' and who were often confirmed in their dominions by the Romans themselves, existed at an earlier period amongst several of the German tribes; but it must not be supposed that these leaders possessed any of the exalted functions and complex attributes which, according to our ideas, constitute royal dignity. A king must be invested with permanent and paramount authority. For the material points at issue are not affected by showing that one powerful chieftain might receive the complimentary title of *rex* from a foreign power, or that another chieftain, with powers approaching to royalty, may not have been created occasionally, and during greater emergencies. The real question is, whether the king had become the lord of the soil, or at least the greatest landed proprietor, and the first 'estate' of the commonwealth, endued with prerogatives which no other member of the

community could claim or exercise. The disposal of the military force, the supreme administration of justice, the right of receiving taxes and tributes, and the character of supreme legislator and perpetual president of the councils of the realm, must all belong to the sovereign, if he is to be king in deed as well as in name." (Rise and Progress of the English Commonwealth, vol. i. p. 553.)

The prerogatives here assigned to royalty as part of its definition, are of so various a nature, and so indefinitely expressed, that it is difficult to argue about them. Certainly a 'king in deed' must receive taxes, and dispose, though not necessarily without consent, of the military force. He must preside in the councils of the realm; but he need not be supreme legislator, if that is meant to exclude the participation of his subjects; much less need he be the lord of the soil — a very modern notion, and merely technical, if indeed it could be said to be true in any proper sense, nor even the greatest landed proprietor. "A king's a king for a' that;" and we have never in England known any other.

But why do these eminent writers depreciate so confidently the powers of a Frank or Saxon king? Even if Cæsar and Tacitus are to be implicitly confided in for their own times, are we to infer that no consolidation of the German clans, if that word is a right one, had been effected in the four succeeding centuries? Are we even to reject the numerous testimonies of Latin writers during those ages, who speak of kings, hereditary chieftains, and leaders of the barbarian armies? If there is a notorious fact, both as to the Salian Franks and the Saxons of Germany, it is that each had an acknowledged royal family. Even if they sometimes chose a king not according to our rules of descent, it was invariably from one ancestor. The house of Meroveus was probably recognised before the existence of that obscure prince; and in England, Hengist could boast the blood of Woden, the demi-god of heroic tradition. A government by *grafs*, or *caldormen* of the *gau*, might suit a people whose forests protected them from invasion, but was utterly incompatible

with the aggressive warfare of the Franks, or of the first conquerors of Kent and Wessex. Grimm, in his excellent Antiquities of German Law, has fully treated of the old Teutonic monarchies, not always hereditary, and never absolute, but easily capable of receiving an enlargement of power in the hands of brave and ambitious princes, such as arose in the great westward movement of Germany.

If, however, the authority of Clovis has been rated too low in my text, it may also be questioned whether that of the next two generations, his sons and grandsons, has not been exaggerated in contrast. It is certainly true, that Gregory of Tours exhibits a picture of savage tyranny in several of these sovereigns. But we are to remember that particular acts of arbitrary power, and especially the putting obnoxious persons to death, were so congenial to the whole manners of the age, that they do not prove the question at issue, whether the government may be called virtually an absolute monarchy. Every Frank of wealth and courage was a despot within his sphere; but his sphere of power was a bounded one; and so, too, might be that of the king. Probably, when Gontran or Fredegonde ordered a turbulent chief to be assassinated, no *weregild* was paid to his kindred; but his death would excite hardly any disapprobation, except among those who thought it undeserved.

Gregory of Tours, it should be kept in mind, was a Roman; he does not always distinguish the two nations; but a great part of the general oppression which we find under the grand-children of Clovis, seems to have fallen on the subject people. As to these, few are inclined to doubt that the king was truly absolute. The most remarkable instances of arbitrary power exerted upon the Franks are in the imposition of taxes. These, as has been said in another note, were repugnant to the whole genius of barbarian society. We find, however, that on the death of Theodebert, king of Austrasia, in 547, the Franks murdered one Parthenius, evidently a Roman, and a minister of the late king—"pro eo quod iis tributa antedicti regis tempore inflixisset." (Greg. Tur. lib. iii.

c. 36.) Whether these tributes continued afterwards to be paid we do not read. Chilperic, the most oppressive of his line, at a later period, in 579, laid a tax on freehold lands—"ut possessor de terra propria amphoram vini per aripennem redderet." (Id. lib. v. c. 29.) It is, indeed, possible that this affected only the Romans, though the language of the historian is general—"descriptiones novas et graves in omni regno suo fieri jussit." A revolt broke out in consequence at Limoges; but the inhabitants of that city were Roman. Chilperic put this down by the help of his faithful Antrustions—"unde multum molestus rex, dirigens de latere suo personas, immensis damnis populum afflixit, suppliciisque conterruit." Mr. Spence (Laws of Modern Europe, p. 269.) is clearly of opinion, against Montesquieu, who confines this tax to the Romans, that it comprehended the Franks also, and was in the nature of the indiction, or land-tax, imposed on the subjects of the Roman empire by an assessment renewed every fifteen years; and this, perhaps, on the whole, is the more probable hypothesis of the two. Mr. S. says (p. 267.), that lands subject to tribute still continued liable when in the possession of a Frank. This is not perhaps improbable, but he refers to texts which do not prove it.

The next passage which I shall quote is more unequivocal. The death of Chilperic exposed his instruments of tyranny, as it had Parthenius in Austrasia, to the vengeance of an oppressed people. Fredegonde, though she escaped condign punishment herself, could not screen these vile ministers:—"Habebat tunc temporis secum Audonem judicem, qui ei tempore regis in multis consenserat malis. Ipse enim cum Mummolo præfecto multos de Francis, qui tempore Childeberti regis senioris ingenui fuerant, publico tributo subegit. Qui, post mortem regis Chilperici, ab ipsis spoliatus ac denudatus est, ut nihil ei, præter quod super se auferre potuit, remaneret. Domos enim ejus incendio subdiderunt; abstulissent utique et ipsam vitam, ni cum regina ecclesiam expetisset." (Lib. vii. c. 15.) The word *ingenui*, in the above passage, means the superior class—alodial

landholders or beneficiaries, as distinguished from the class named *lidi*, who are also perhaps sometimes called *tributarii*, as well as the Romans, and from whom a public *census*, as some think, was due. We may remark here, that the removing of a number of Franks from their own place as *ingenui*, to that of tributaries, was a particular act of oppression, and does not stand quite on the footing of a general law. The passage in Gregory is chiefly important, as it shows that the *ingenui* were not legally subject to public tribute.

M. Guizot has adduced a constitution of Clotaire II. in 615, as a proof that endeavours had been made by the kings to impose undue taxes. This contains the following article: "Ut ubicunque census novus impie additus est, et a populo reclamatur, justa inquisitione misericorditer emendetur." (C. 8.) But does this warrant the inference that any tax had been imposed on the free-born Frank? "*Census*" is generally understood to be the capitation paid by the *tributarii*, and the words imply a local exaction rather than a national imposition by the royal authority. It is not even manifest that this provision was founded exclusively on any oppression of the crown; several other articles in this celebrated law are extensively remedial, and forbid all undue spoliation of the weak. But if we should incline to Guizot's interpretation, it will not prove, of course, the right of the kings to impose taxes on the Franks, since that to which it adverts is called *census novus impie additus*.

The inference which I have drawn, in page 155, Note *, from the language of the laws, is inconclusive. Bouquet, in the Recueil des Historiens (vol. iv.), admits only seven laws during the Merovingian period, differing from Baluze as to the particular sovereigns by whom several of them were enacted. Of these the first is by Childebert I. king of Paris, in 532, according to him; by Childebert II. of Austrasia, according to Baluze; which, as the date is Cologne, and several Austrasian cities are mentioned in it which never belonged to the first Childebert, I cannot but think more likely. This constitution, as I have observed,

has *unà cum nostris optimatibus*, and, *convenit unà cum leudis nostris*. And the expressions lead to two inferences; first, that the assembly of the Field of March was, in that age, annually held; secondly, that it was customary to send round to the people the determinations of the optimates in this council:—"Cum nos omnes calendas Martias de quascunque conditiones unà cum optimatibus nostris pertractavimus, ad unumquemque notitiam volumus pervenire." The grammar is wretched, but such is the evident sense.

The second law, as it is called, is an agreement between Childebert and Clotaire; the first of each name according to Bouquet, the second, according to Baluze. This wants all enacting words except "Decretum est." The third is an ordinance of Childebert for abolishing idolatrous rites, and keeping festivals. It is an enforcement of ecclesiastical regulations, not perhaps reckoned at that time to require legislative sanction. The fourth, of Clotaire I. or Clotaire II. begins "Decretum est," and has no other word of enactment. But this does not exclude the probability of consent by the leudes. Clotaire I. in another constitution, speaks authoritatively. But it will be found, on reading it, that none except his Roman subjects are concerned. The sixth is merely a precept of Gontran, directed to the bishops and judges, enjoining them to maintain the observance of the Lord's day and other feasts. The last is the edict of Clotaire II. in 615, already quoted, and here we read:—"Hanc deliberationem quam cum pontificibus vel tam magnis viris optimatibus, aut fidelibus nostris in synodali concilio instituimus."

After 615, no law is extant enacted in any of the Frank kingdoms, before the reign of Pepin. This, however, cannot of itself warrant the assertion that none were enacted which do not remain. It is more surprising, perhaps, that even a few have been preserved. The language of Childebert above cited leads to the belief that, in the sixth century, whatever we may suppose as to the next, an assembly with powers of legislation was regularly held by the Frank sovereigns. Nothing, on the whole,

warrants the supposition that the three generations after Clovis possessed an acknowledged right, either of legislating for their Frank subjects, or imposing taxes upon them. But after the assassination of Sigebert, under the walls of Tournay, in 575, the Austrasian nobles began to display a steady resistance to the authority which his widow Brunehaut endeavoured to exercise in her son's name. This, after forty years, terminated in her death, and in the reunion of the Frank monarchy with a much more aristocratic character than before, under the second Clotaire. It is a revolution to which we have already drawn attention in the note on Brunehaut.

64.

NOBILITY.

Edit. 1826, p. 158. Edit. 1841, p. 106.

"THE existence," says Savigny, "of an original nobility, as a particular patrician order, and not as a class indefinitely distinguished by their wealth and nobility, cannot be questioned. It is difficult to say from what origin this distinction may have proceeded; whether it was connected with the services of religion, or with the possession of the heritable offices of counts. We may affirm, however, with certainty, that the honour enjoyed was merely personal, and conferred no preponderance in the political or judicial systems." (Ch. iv. p. 172. English translation.) This admits all the theory to which I have inclined in the text, namely, the non-existence of a privileged order, though antiquity of family was in high respect. The *eorl* of Anglo-Saxon law was, it may be said, distinguished by certain privileges from the *ceorl*. Why could not the same have been the case with the Franks? We may answer, that it is by the laws and records of those times that we prove the former distinction in England; and it is by the absence of all such proof that the non-existence of such a distinction in France has been presumed. But if the *lidi*, of whom

we so often read, were Franks by origin, and moreover personally free, which I do not discuss, they will be the corresponding rank to the Anglo-Saxon *ceorl*, superior as, from whatever circumstances, the latter may have been in his social degree. All the *Franci ingenui* will thus have constituted a class of nobility; in no other sense, however, than all men of white race constitute such a class in those of the United States where slavery is abolished; which is not what we usually mean by the word. In some German nations we have, indeed, a distinct nobility of blood. The Bavarians had five families, for the death of a member of whom a double composition was paid. They had one, the Agilolfungi, whose composition was fourfold. Troja also finds proof of two classes among the Alemanns (v. 168.). But we are speaking only of the Franks; a cognate people indeed to the Saxons and Alemanns, but not the same, and whose origin is not that of a pure single tribe. The Franks were collectively like a new people in comparison with some others of Teutonic blood. It does not therefore appear to me so unquestionable as to Savigny, that a considerable number of families formed a patrician order in the French monarchy, without reference to hereditary possessions or hereditary office.

A writer of considerable learning and ingenuity, but not always attentive to the strict meaning of what he quotes, has found a proof of family precedence among the Franks, in the words *crinosus* and *crinitus*, employed in the Salic law and in an edict of Childebert. (Meyer, Institut. Judiciaires, vol. i. p. 104.) This privilege of wearing long hair he supposes peculiar to certain families, and observes that *crinosus* is opposed to *tonsoratus*. But why should we not believe that all superior freemen, that is, all Franks, whose composition was of two hundred solidi, wore this long hair, though it might be an honour denied to the *lidi*? Gibert, in a memoir on the Merovingians (Acad. des Inscript. xxx. 583.), quotes a passage of Tacitus, concerning the manner in which the nation of the Suevi wore their hair, from whom the Franks are supposed by him to be descended. And there is at least

something remarkable in the language of Tacitus, which indicates a distinction between the royal family and other freemen, as well as between these and the servile class. The words have not been, I think, often quoted :— "Nunc de Suevis dicendum est, quorum non una ut Cattorum Tencterorumque gens; majorem enim Germaniæ partem obtinent, propriis adhuc nationibus discreti, quamquam in communi Suevi dicuntur. Insigne gentis obliquare crinem, nodoque substringere. Sic Suevi a cæteris Germanis, sic Suevorum ingenui a servis separantur. In aliis gentibus seu cognatione aliqua Suevorum, seu, quod accidit, imitatione, rarum et intra juventæ spatium, apud Suevos usque ad canitiem, horrentem capillum retro sequuntur, ac sæpe in ipso solo vertice religant; *principes et ornatiorem habent.*" (De Mor. German. c. 38.) This last expression may account for the word *crinitus* being sometimes applied to the royal family, as it were exclusively; sometimes to the Frank nation, or its freemen.* The references of M. Meyer are so far from sustaining his theory, that they rather lead me to an opposite conclusion.

M. (Naudet in Mémoires de l'Académie des Inscriptions (Nouvelle Serie), vol. viii. p. 502.) enters upon an elaborate discussion of the state of persons under the first dynasty. He distinguishes, of course, the *ingenui* from the *lidi*. But among the former he conceives that there were two classes: the former absolutely free as to their persons, valued in their *weregild* at 200 solidi, meeting in the county *mallus*, and sometimes in the national assembly; in a word, the *populus* of the Frank monarchy; the latter valued, as he supposes, at 100 solidi, living under the protection or *mundebunde* of some rich man, and though still free, and said to be *ingenuili ordine servientes*, not very distinguishable at present from the *lidi*.

* The royal family seem also to have worn longer hair than the others. Childebert proposed to Clotaire, as we read in Gregory of Tours (iii. 18.), that the children of their brother Clodimir should be either cropped or put to death: "quid de his fieri debeat; et utrum incisa cæsarie, ut reliqua plebs habeantur, an certè his interfectis regnum germani nostri inter nosmetipsos æqualitate habita dividatur."

I do not know that this theory has been countenanced by other writers. But even if we admit it, the higher class could not possibly be denominated an hereditary nobility; their privileges would be those of better fortune; which had rescued them from the dependence into which, from one cause or another, their fellow-citizens had fallen. The Franks in general are called by Guizot, *une noblesse en décadence;* the *leudes*, one *en progrès*. But he maintains that from the fifth to the eleventh age there existed no real nobility of birth. In this, however, he goes much farther than Mably, who does not scruple to admit an hereditary nobility in the time of Charlemagne, and probably farther than can be reasonably allowed, especially if the eleventh century is to be understood inclusively. In that century we shall see that the nobles formed a distinct order; and I am much inclined to believe that this was the case as soon as feudal tenure became general, which was at least as early as the tenth.

M. Lehuerou denies any *hereditary* nobility during the Merovingian period, at least, of French history: "Il n'existait donc point de noblesse dans le sens moderne du mot, puisqu'il n'y avait point d'hérédité, et puisque l'hérédité, si elle se produisait quelquefois, était purement accidentelle; mais il y avait une aristocratie mobile, changeante, variable au gré des accidents et des caprices de la vie barbare, et néanmoins en possession de véritables priviléges qu'il faut se garder de méconnaître. Cette aristocratie était plutôt celle des titres, des places et des honneurs, que celle de la naissance, quoique celle-ci n'y fût pas étrangère. Elle était plus dans le présent, et moins dans le passé; elle empruntait plus à la puissance actuelle qu'à celle des souvenirs; mais elle ne s'en détachait pas moins nettement des couches inférieures de la population, et notamment de la foule de ceux dont la noblesse ne consistait que dans leur ingénuité." (Inst. Caroling. p. 452.)

It is said in the text that in these early ages property did not very frequently change hands, and desert the family who had long possessed it. This is not very accurately expressed. Property changed hands often enough,

by all violent means. I must have meant that it was not in the market, as we call it, so often as at present; but it is an incorrect expression, and affects the reasoning.

65.

NOBILITY AMONG ANGLO-SAXONS.

Edit. 1826, p. 159. Edit. 1841, p. 107.

THIS very much depends upon our definition of nobility. The differences of ranks among the Anglo-Saxons will be considered in a subsequent Chapter.

66.

HEREDITARY BENEFICES.

Edit. 1826, p. 164. Edit. 1841, p. 110.

THE nature of benefices is very well discussed, like every thing else, by M. Guizot, in his Essai sur l'Hist. de France, p. 120. He agrees with me in the two main positions; that benefices, considered generally, never passed through the supposed stage of grants revocable at pleasure, and that they were sometimes granted in inheritance from the sixth century downwards. This, however, was rather the exception, he supposes, than the rule. "We cannot doubt that, under Charlemagne, most benefices were granted only for life." (p. 140.) Louis the Debonair endeavoured to act on the same policy, but his efforts were unsuccessful. Hereditary grants became the rule, as is proved by many charters of his own and Charles the Bald. Finally, he tells us, the latter prince, in 877, empowered his *fideles* to dispose of their benefices as they thought fit, provided it were to persons capable of serving the estate. But this is too largely expressed; the power given is to those vassals who might desire to take up their abode in a cloister; and it could only be exercised in

favour of a son or other kinsman.* But the right of inheritance had, probably, been established before. Still, so deeply was the notion of a personal relation to the grantor implanted in the minds of men, that it was common, notwithstanding the largest terms of inheritance in a grant, for the new tenant to obtain a confirmation from the Crown. This might also be for the sake of security. And this is precisely the renewal of homage and fealty on a change of tenancy, which belonged to the more matured stage of the feudal polity.

Mr. Allen observes, with respect to the formula of Marculfus quoted in my note:—"Some authors have considered this as a precedent for the grant of an hereditary benefice. But it is only necessary to read with attention the act itself, to perceive that what it creates is not an hereditary benefice, but an alodial estate. It is viewed in this light in his (Bignon's) notes on a subsequent formula (sect. 17.), confirmatory of what had been done under the preceding one, and it is only from inadvertence that it could have been considered in a different point of view." (Inquiry into Royal Prerogative, Appendix, p. 47.) But Bignon took for granted that benefices were only for term of life, and consequently that words of inheritance, in the age of Marculfus, implied an alodial grant. The question is; What constituted a benefice? Was it not a grant by favour of the King or other lord? If the words used in the formula of Marculfus are inconsistent with a beneficiary property, we must give up the inference from the treaty of Andely, and from all other phrases which have seemed to convey hereditary benefices. It is true that the formula in Marculfus gives a larger power of alienation than belonged afterwards to fiefs; but did it put an end to the peculiar obligation of the holder of the benefice towards the crown? It does not appear to me unreasonable to suppose an estate so conferred to have

* Si aliquis ex fidelibus nostris post obitum nostrum, Dei et nostro amore compunctus, sæculo renuntiare voluerit, et filium vel talem propinquum habuerit qui reipublicæ prodesse valeat, suos honores prout melius voluerit ei valeat placitare. — Script. Rer. Gall. vii. 701.

been strictly a benefice, according to the notions of the seventh century.

Sub-infeudation could hardly exist to any considerable degree until benefices became hereditary. But as soon as that change took place, the principle was very natural, and sure to suggest itself. It prodigiously strengthened the aristocracy, of which they could not but be aware; and they had acquired such extensive possessions out of the royal domains, that they could well afford to take a rent for them in iron instead of silver. Charlemagne, as Guizot justly conceives, strove to counteract the growing feudal spirit, by drawing closer the bonds between the sovereign and the subject. He demanded an oath of allegiance, as William afterwards did in England, from the vassals of mesne lords. But after his death, and after the complete establishment of an hereditary right in the grants of the Crown, it was utterly impossible to prevent the general usage of sub-infeudation.

Mably distinguishes the lands granted by Charles Martel to his German followers, from the benefices of the early kings, reserving to the former the name of fiefs. These he conceives to have been granted only for life, and to have involved, for the first time, the obligation of military service. (Observations sur l'Hist. de France, vol. i. p. 32.) But as they were not styled fiefs so early, but only benefices, this distinction seems likely to deceive the reader; and the oath of fidelity taken by the Antrustion, which, though personal, could not be a weaker obligation after he had acquired a benefice, carries a very strong presumption that military service, at least in defensive wars, not always distinguishable from wars to revenge a wrong, as most are presumed to be, was demanded by the usages and moral sentiments of the society. We have not a great deal of testimony as to the grants of Charles Martel; but in the capitularies of Charlemagne, it is evident that all holders of benefices were bound to follow the sovereign to the field.

M. Guérard (Cartulaire de Chartres, i. 23.), is of opinion that, though benefices were ultimately fiefs, in the

first stage of the monarchy they were only usufructs; and the word will not be clearly found in the restrained sense during that period. "Cette différence entre deux institutions nées l'une de l'autre, quoique assez délicate, était essentielle. Elle ne pourrait être méconnue que par ceux qui considéreraient seulement les bénéfices à la fin, et les fiefs au commencement de leur existence; alors en effet les uns et les autres se confondaient. That they were not mere usufructs, even at first, appears to me more probable.

67.

THE WORD FEUDUM.

Edit. 1826, p. 165. note *. Edit. 1841, p. 111. note *.

SIR F. PALGRAVE answers this by producing the word *lehn*. (English Commonwealth, ii. 208.) And though M. Thierry asserts (Récits des temps Mérovingiens, i. 245.) that this is modern German, he seems to be altogether mistaken. (Palgrave, ibid.) But when Sir F. P. proceeds to say—"The essential and fundamental principle of a territorial fief or feud is, that the land is held by a limited or conditional estate — the property being in the lord, and the usufruct in the tenant," we must think this not a very exact definition of feuds in their mature state, however it might apply to the early benefices for life. The *property*, by feudal law, was, I conceive, strictly in the tenant; what else do we mean by fee simple? Military service in most cases, and always fealty, were due to the lord, and an abandonment of the latter might cause forfeiture of the land; but the tenant was not less the owner, and might destroy it or render it unprofitable if he pleased.

Feudum Sir F. Palgrave boldly derives from *emphyteusis*; and, in fact, by processes familiar to etymologists, that is, cutting off the head and legs, and extracting the back bone, it may thence be exhibited in the old form,

feum, or *fevum*. M. Thierry, however, thinks *feh*, that is, fee or pay, and *odh*, property, to be the true root. (Lettres sur l'Hist. de France, Lettre x.) Guizot inclines to the same derivation; and it is, in fact, given by Ducange and others. The derivation of *alod* from *all* and *odh* seems to be analogous; and the word *udaller*, for the freeholder of the Shetland and Orkney Isles, strongly confirms this derivation, being only the two radical elements reversed, as I remember to have seen observed in Gilbert Stuart's View of Society. A charter of Charles the Fat is suspected on account of the word feudum, which is at least of very rare occurrence till late in the tenth century. The great objection to *emphyteusis* is, that a fief is a different thing. Sir F. Palgrave, indeed, contends that an "emphyteusis" is often called a "precaria," and that the word "precaria" was a synonym of "beneficium," as beneficium was of "feudum." But does it appear from the ancient use of the words "precaria" and "beneficium" that they were convertible, as the former is said, by Muratori and Lehuerou, to have been with emphyteusis? (Murat. Antiq. Ital. Diss. xxxvi. Lehuerou, Inst. Caroling. p. 183.) The tenant by *emphyteusis*, whom we find in the Codes of Theodosius and Justinian, was little more than a *colonus*, a demi-serf attached to the soil, though incapable of being dispossessed. Is this like the holder of a benefice, the progenitor of the great feudal aristocracy? How can we compare emphyteusis with beneficium, without remembering that one was commonly a grant for a fixed return in value, answering to the "terræ censuales" of later times, and the latter, as the word implies, a free donation, with no condition but gratitude and fidelity? The word *precaria* is for the most part applied to ecclesiastical property, which, by some usurpation, had fallen into the hands of laymen. These afterwards, by way of compromise, were permitted to continue as tenants of the Church, for a limited term, generally of life, on payment of a fixed rate. Marculfus, however, gives a form in which the grantor of the precaria appears to be a layman. Military service was not contemplated in the emphyteusis or the

precaria, nor were either of them perpetuities; at least this was not their common condition. Meyer derives feudum from *fides*, quoting Aimoin: "Leudibus suis in *fide* disposuit." (Inst. Judic. i. 187.)

68.

COMMENDATION.

Edit. 1826, p. 171. Edit. 1841, p. 116.

M. GUIZOT with the highest probability refers the conversion of alodial into feudal lands to the principle of commendation. (Essais sur l'Hist. de France, p. 166.) Though originally this had no relation to land, but created a merely personal tie—fidelity in return for protection, it is easy to conceive that the alodialist who obtained this privilege, as it might justly appear, in an age of rapine, must often do so by subjecting himself to the law of tenure; a law less burdensome at a time when warfare, if not always defensive, as it was against the Normans, was always carried on in the neighbourhood, at little expense beyond the ravages that might attend its want of success. Raynouard has published a curious passage from the Life of St. Gerald, a count of Aurillac, where he is said to have refused to subject his alodial lands to the duke of Guienne, with the exception of one farm, peculiarly situated. "Erat enim semotim, inter pessimos vicinos, longe a cæteris disparatum." His other lands were so situated that he was able to defend them. Nothing can better explain the principle which rivetted the feudal yoke upon alodialists. (Hist. du Droit Municipal, ii. 261.)

In my text, though M. Guizot has done me the honour to say, "M. Montlosier et M. Hallam en ont mieux demêlé la nature et les causes," the subject is not sufficiently disentangled, and the territorial character which commendation ultimately assumed is too much separated from the personal. The latter preceded even the conquest of Gaul, both among the barbarian invaders themselves

and the provincial subjects*, and was a sort of *clientela;* but the former deserves also the name of commendation, though the Franks had a word of their own to express it. We find in Marculfus the form by which the King took an ecclesiastical person, with his property and followers, under his own *mundeburde*, or safeguard. (Lib. i. c. 44.) This was equivalent to commendation, or rather another word for it; except as one rather expresses the act of the tenant, the other that of the lord. Letters of safeguard were not by any means confined to the Church. They were frequent as long as the Crown had any power to protect, and revived again in the decline of the feudal system. Nor were they limited to the Crown; we have the form by which the poor might place themselves under the *mundeburde* of the rich, still being free, "ingenuili ordine servientes." (Formulæ Veteres Bignonii, c. 44., quoted by Naudet.) They were then even sometimes called, as the latter supposes, *lidi* or *liti*, so that a freeman, even of the higher class, might, at his option, fall, for the sake of protection, into an inferior position.

I have no hesitation in agreeing with Guizot, that the conversion of alodial into feudal property was nothing more than an extension of the old commendation. It was not necessary that there should be an express surrender and regrant of the land; the acknowledgment of seigniory

* M. Lehuerou has gone very deeply into the *mundium*, or personal safeguard, by which the inferior class among the Germans were *commended* to a lord and placed under his protection, in return for their own fidelity and service. (Institutions Carolingiennes, liv. i. ch. i. § 2.) It is a subject, as he conceives, of the highest importance in these inquiries, being, in fact, the real origin of the feudal polity afterwards established in Europe; though, from the circumstances of ancient Germany, it was of necessity a personal and not a territorial vassalage. It fell in very naturally with the similar principle of commendation existing in the Roman empire. This bold and original theory, however, has not been admitted by his contemporary antiquaries. M. Giraud and M. Mignet (Séances et Travaux de l'Académie des Sciences Morales et Politiques, pour Novembre, 1843), especially the latter, dissent from this explication of the origin of feudal polity, which was in no degree of a *domestic* character. The most we could allow is, that territorial jurisdiction was extended to feudal vassals, by analogy to that which the patron, or chief of the *mundium*, had exercised over those who recognised him as protector, as well as over his family and servants. There is, nevertheless perhaps, a larger basis of truth in M. Lehuerou's system than they admit, though I do not conceive it to explain the whole feudal system.

by the *commendatus* would supply the place. M. Naudet (Mém. de l'Acad. du Inscript. vol. viii.) accumulates proofs of commendation: it is surprising that so little was said of it by the earlier antiquaries. One of his instances deserves to be mentioned. "Isti homines," says a writer of Charlemagne's age, "fuerunt liberi et ingenui; sed quod militiam regis non valebant exercere, tradiderunt alodos suos sancto Germano." * (p. 567.) We may perhaps infer from this, that the tenants of the Church were not bound to military service. "No general law," says M. Guizot (Collect. de Mém. i. 419.), "exempted them from it; but the clergy endeavoured constantly to secure such an immunity, either by grant or by custom, which was one cause that their tenants were better off than those of laymen." The difference was indeed most important, and must have prodigiously enhanced the wealth of the Church. But after the feudal polity became established, we do not find that there was any dispensation for ecclesiastical fiefs. The advantage of their tenants lay in the comparatively pacific character of their spiritual lords. It may be added, that from many passages in the laws of the Saxons, Alemanns, and Bavarians, all the "commendati" appear to have been denominated vassals, whether they possessed benefices or not. That word afterwards implied a more strictly territorial limitation.

Thus then, let the reader keep in mind, that the feudal system, as it is commonly called, was the general establishment of a peculiar relation between the sovereign (not as king, but as lord) and his immediate vassals; between these again, and others standing to them in the same relation of vassalage, and thus frequently through several links in the chain of tenancy. If this relation, and especially if the latter and essential element, sub-infeudation, is not to be found, there is no feudal system, though there may be analogies to it, more or less remarkable or strict. But if he asks, what were the immediate causes of establishing this polity, we must refer him to three alone: to

* It will be remarked that *liberi* and *ingenui* appear here to be distinguished; "not only free, but gentlemen."

the grants of beneficiary lands, to the vassal and his heirs, without which there could hardly be sub-infeudation; to the analogous grants of official honours, particularly that of count or governor of a district; and lastly, to the voluntary conversion of alodial into feudal tenure, through free landholders submitting their persons and estates, by way of commendation, to a neighbouring lord or to the count of a district. All these, though several instances, especially of the first, occurred much earlier, belong generally to the ninth century, and may be supposed to have been fully accomplished about the beginning of the tenth; to which period therefore, and not to an earlier one, we refer the feudal system in France. We say in France, because our attention has been chiefly directed to that kingdom; in none was it of earlier origin, but in some it cannot be traced so high.

An hereditary benefice was strictly a fief, at least if we presume it to have implied military service; hereditary governments were not: something more therefore was required to assimilate these, which were far larger and more important than donations of land. And perhaps it was only by degrees that the great chiefs, especially in the south, who, in the decay of the Caroline race, established their patrimonial rule over extensive regions, condescended to swear fealty, and put on the condition of vassals dependent on the Crown. Such at least is the opinion of some modern French writers, who seem to deny all subjection during the evening of the second and dawn of the third race. But if they did not repair to Paris or Laon in order to swear fealty, they kept the name of the reigning king in their charters.

The hereditary benefices of the ninth century, or in other words, fiefs, preserved the nominal tie, and kept France from utter dissolution. They deserve also the greater praise of having been the means of regenerating the national character, and giving its warlike bearing to the French people; not indeed as yet collectively, but in its separate centres of force, after the pusillanimous reign of Charles the Bald. They produced much evil and

misery, but it is reasonable to believe that they prevented more. France was too extensive a kingdom to be governed by a central administration, unless Charlemagne had possessed the gift of propagating a race of Alfreds and Edwards, instead of Louis the Stammerers and Charles the Balds. Her temporary disintegration by the feudal system, was a necessary consequence; without that system there would have been a final dissolution of the monarchy, and perhaps its conquest by barbarians.

69.

RELIEFS.

Edit. 1826, p. 183. Edit. 1841, p. 121.

It seems to have been generally the rule, in the customary law of France, that reliefs were not due, except on collateral succession. Ducange.

70.

GUARDIANSHIP IN CHIVALRY.

Edit. 1826, p. 190. Edit. 1841, p. 128.

M. Guizot observes on this (Hist. de la Civilisation en France, Leçon 39.), that the feudal incidents of guardianship in chivalry and marriage were more frequent in France than I seemed to suppose.

71.

PRINCES IN THE EMPIRE.

Edit. 1826, p. 194. Edit. 1841, p. 131.

The Count of Anjou, under Louis VI., claimed the office of Great Seneschal of France; that is, to carry dishes to

the king's table on state days. (Sismondi, v. 135.) Thus the feudal notions of grand serjeanty prepared the way for the restoration of royal supremacy, as the military tenures had impaired it. The wound and the remedy came from the same lance. If the feudal system was incompatible with despotism, and even, while in its full vigour, with legitimate authority, it kept alive the sense of a supreme chief, of a superiority of rank, of a certain subjection to an hereditary sovereign, not yet testified by unlimited obedience, but by homage and loyalty.

72.

ANALOGIES TO FEUDAL SYSTEMS.

Edit. 1826, p. 200. Edit. 1841, p. 138.

THE advocates of a Roman origin for most of the institutions which we find in the kingdoms erected on the ruins of the empire, are naturally prone to magnify the analogies to feudal tenure which Rome presents to us, and even to deduce it, either from the ancient relation of patron and client, and that of personal commendation, which was its representative in a later age, or from the frontier lands granted in the third century to the Læti, or barbarian soldiers, who held them, doubtless, subject to a condition of military service. And I am willing to confess, that these are mentioned too slightly in my text, as "seeming analogies, which vanish away when closely observed." The usage of *commendation* especially, so frequent in the fifth century before the conquest of Gaul, as well as afterwards, does certainly bear a strong analogy to vassalage, and I have already pointed it out as one of its sources. It wanted, however, that definite relation to the tenure of land, which distinguished the latter. The royal Antrustio (whether the word *commendatus* were applied to him or not, but it was perhaps confined to Romans), stood bound by gratitude and loyalty to his sovereign, and in a very different degree from a common subject; but he

was not perhaps a vassal till he had received a territorial benefice. The complexity of sub-infeudation could have no analogy in commendation. The grants to veterans and to the Læti are so far only analogous to fiefs, that they established the principle of holding lands on a condition of military service. But this service was no more than what, both under Charlemagne and in England, if not in other times and places, the alodial freeholder was bound to render for the defence of the realm; it was more commonly required, because the lands were on a barbarian frontier; but the duty was not even *very* analogous to that of a feudal tenant.* The essence of a fief seems to be, that its tenant owed fealty to a lord, and not to the state or the sovereign; the lord might be the latter, but it was not, feudally speaking, as a sovereign that he was obeyed. There is, therefore, sufficient to warrant us in tracing the real theory of feuds no higher than the Merovingian history in France; their full establishment, as has been seen, is considerably later. But the preparatory steps in the constitutions of the declining empire are of considerable importance; and these I had passed over without sufficiently directing the reader to them, not merely as analogies, but as predisposing circumstances, and even germs to be subsequently developed. The beneficiary tenure of lands could not well be brought by the conquerors from Germany; but the donatives of arms or precious metals bestowed by the chiefs on their followers, were also analogous to fiefs; and, as the Roman institutions were one source of the law of tenure, so these were another.

* If Gothofred is right in his construction of the tenure of these Læti, they were not even generally liable to this part of our *trinoda necessitas*, but only to conscription for the legions. Et ea tamen conditione terras illis excolendas Læti consequebantur, ut *delectibus quoque obnoxii essent* et legionibus insererentur. (Not. ad Cod. Theod. l. vii. tit. 20. c. 12.) Sir Francis Palgrave, however, says—"The duty of bearing arms was inseparably connected with the property." (English Commonwealth, i. 354.) This is too equivocal; but he certainly means more than Gothofred; he supposes a permanent universal obligation to render service in all public warfare.

73.

NOBILITY.

Edit. 1826, p. 205. Edit. 1841, p. 138.

M. GUÉRARD observes, that in the Chartulary of Chartres, exhibiting the usages of the eleventh and beginning of the twelfth centuries, "La noblesse s'y montre complétement constituée; c'est à dire, privilegiée et héréditaire. Elle peut être divisée en haute, moyenne, et basse." By the first he understands those who held immediately of the crown; the middle nobility were mediate vassals, but had rights of jurisdiction, which the lower had not. (Prolégomènes à la Cartulaire de Chartres, p. 30.)

74.

SURNAMES.

Edit. 1826, p. 205. Edit. 1841, p. 138.

M. GUÉRARD finds a few hereditary surnames in the eleventh century, and many that were personal. (Cartulaire de Chartres, p. 93.) The latter are not surnames at all, in our usual sense.

75.

FEUDAL ARISTOCRACY.

Edit. 1826, p. 209. Edit. 1841, p. 139.

M. THIERRY, whose writings display so much antipathy to the old nobility of his country, that they ought not to be fully trusted on such a subject, observes that the Franks were more haughty towards their subjects than any other barbarians, as is shown in the difference of *weregild.*

From them this spirit passed to the French nobles of the middle ages, though they were not all of Frank descent. "L'excès d'orgueil attaché à longtemps au nom de gentilhomme, est né en France; son foyer, comme celui de l'organisation féodale, fut la Gaule du centre et du Nord, et peut-être aussi l'Italie Lombarde. C'est de là qu'il s'est propagé dans les pays Germaniques, où la noblesse antérieurement se distinguait peu de la simple condition d'homme libre. Ce mouvement créa, par-tout où il s'étendit, deux populations, et comme deux nations, proprement distinctes." (Récits des Temps Mérovingiens, i. 250.)

The feudal principle was essentially aristocratic, and tended to enhance every unsocial and unchristian sentiment involved in the exclusive respect for birth. It had of course its countervailing virtues, which writers of M. Thierry's school do not enough remember. But a rural aristocracy, in the meridian of feudal usages, was insulated in the midst of the other classes of society far more than could ever happen in cities, or in any period of an advanced civilisation. "Never," says Guizot, "had the primary social molecule been so separated from other similar molecules; never had the distance been so great between the simple and essential elements of society." The châtelain amidst his machicolated battlements, and massive gates with their iron portcullis, received the vavassor, though as an inferior, at his board; but to the roturier no feudal board was open; the owner of a "terre censive," the opulent burgess of a neighbouring town, was as little admitted to the banquet of the lord, as he was allowed to unite himself in marriage to his family.

"Nec Deus hunc mensa, Dea nec dignata cubili est."

Pilgrims, indeed, and travelling merchants, may, if we trust romance, have been always excepted. Although, therefore, some of Guizot's phrases seem overcharged, since there was in fact more necessary intercourse between the different classes than they intimate, yet that of a

voluntary nature, and what we peculiarly call social, was very limited. Nor is this surprising when we recollect that it has been so till comparatively a recent period.

Guizot has copied a picturesque description of a feudal castle in the fourteenth century from Monteil's Histoire des Français des divers Etats aux cinq derniers siècles. It is one of the happiest passages in that writer, hardly more distinguished by his vast reading than by his skill in combining and applying it, though sometimes bordering on tediousness by the profuse expenditure of his commonplace books on the reader.

" Représentez vous d'abord une position superbe, une montagne escarpée, hérissée de rochers, sillonée de ravins et de précipices; sur le penchant est le château. Les petites maisons qui l'entourent en font ressortir la grandeur; l'Indre semble s'écarter avec respect; elle fait un large demi-cercle à ses pieds.

" Il faut voir ce château, lorsqu'au soleil levant ses galéries extérieures reluisent des armures de ceux qui font le guet, et que ses tours se montrent toutes brillantes de leurs grandes grilles neuves. Il faut voir tous ces hauts bâtiments qui remplissent de courage ceux qui les défendent, et de frayeur ceux qui seraient tentés de les attaquer.

" La porte se présente toute couverte de têtes de sangliers ou de loups, flanquée de tourelles et couronnée d'un haut corps de garde. Entrez-vous? trois enceintes, trois fosses, trois pont-levis à passer; vous vous trouverez dans la grande cour carrée où sont les citernes, et à droite ou à gauche les écuries, les poulaillers, les colombiers, les remises. Les caves, les souterrains, les prisons sont par dessous; par dessus sont les logements, les magazins, les lardoirs ou saloirs, les arsenaux. Tous les combles sont bordés des mâchicoulis, des parapets, des chemins de ronde, des guérites. Au milieu de la tour est le donjon, qui renferme les archives et le trésor. Il est profondement fossoyé dans tout son pourtour, et on n'y entre que par un pont presque toujours levé; bien que les murailles aient, comme celles du château, plus de six pieds d'épais-

seur, il est revêtu, jusqu'à la moitié de sa hauteur, d'une chemise, ou second mur, en grosses pierres de taille.

" Ce château vient d'être refait à neuf. Il y a quelque chose de léger, de frais, que n'avaient pas les châteaux lourds et massifs des siècles passés." (Civilis. en France, Leçon 35.)

And this was true; for the castles of the tenth and eleventh centuries wanted all that the progress of luxury and the cessation, or nearly such, of private warfare had introduced before the age to which this description refers; they were strongholds, and nothing more; dark, small, comfortless, where one thought alone could tend to dispel their gloom, that life and honour, and what was most valuable in goods, were more secure in them than in the champaign around.

76.

VAVASSORS IN ENGLAND.

Edit. 1826, p. 211. Edit. 1841, p. 142.

CHAUCER concludes his picturesque description of the Franklin, in the prologue to the Canterbury Tales, thus: —

" Was never such a worthy vavassor."

This has perplexed some of our commentators, who not knowing well what was meant by a franklin or by a vavassor, fancied the latter to be of much higher quality than the former. The poet, however, was strictly correct; his acquaintance with French manners showed him that the country squire, for his franklin is no other, precisely corresponded to the vavassor in France. Those who having been deceived, by comparatively modern law books, into a notion that the word franklin denoted but a stout yeoman, in spite of the wealth and rank which Chaucer assigns to him, and believing also, on the authority of a

loose phrase in Bracton, that all vavassors were "magnæ dignitatis viri," might well be puzzled at seeing the words employed as synonyms. See Todd's Illustrations of Gower and Chaucer for an instance.

77.

FREEMEN.

Edit. 1826, p. 215. Edit. 1841, p. 145.

M. GUIZOT has declared it to be the most difficult of questions relating to the state of persons in the period from the fifth to the tenth century, whether there existed in the countries subdued by the Germans, and especially by the Franks, a numerous and important class of freemen, not vassals either of the king or any other proprietor, nor any way dependent upon them, and with no obligation except towards the state, its laws and magistrates. (Essais sur l'Hist. de France, p. 232.) And this question, contrary to almost all his predecessors, he inclines to decide negatively. It is indeed evident, and is confessed by M. Guizot, that in the ages nearest to the conquest, such a class not only existed, but even comprised a large part of the nation. Such were the owners of *sortes* or of *terra Salica*, the alodialists of the early period. It is also agreed, as has been shown in another place, that, towards the tenth century, the number of these independent landholders was exceedingly diminished by territorial commendation; that is, the subjection of their lands to a feudal tenure. The last of these changes, however, cannot have become general under Charlemagne, on account of the numerous capitularies which distinguish those who held lands of their own, or alodia, from beneficiary tenants. The former, therefore, must still have been a large and important class. What proportion they bore to the whole nation at that or any other era, it seems impossible to pronounce; and equally so to what extent the old usage of personal commendation, contradistinguished from territo-

rial, may have reached. Still alodial lands, as has been observed, were always very common in the south of France, to which Flanders might be added. The strength of the feudal tenures, as Thierry remarks, was between the Somme and the Loire. (Récits des T. M. i. 245.) These alodial proprietors were evidently freemen. In the law of France, alodial lands were always noble, like fiefs, till the reformation of the Coutume de Paris, in 1580; when aleux roturiers were for the first time recognised. I owe this fact, which appears to throw some light on the subject of this note, to Laferrière, Hist. du Droit Français, p. 129. But perhaps this was not the case in Flanders, which was an alodial country:—"La maxime française, nulle terre sans seigneur, n'avait point lieu dans les Pays-Bas. On s'en tenait au principe de la liberté naturelle des biens, et par suite à la nécessité d'en prouver la sujétion ou la servitude: aussi les biens allodiaux étaient très nombreux, et rappelaient toujours l'esprit de liberté que les Belges ont aimé, et conservé tant à l'égard de leurs biens que de leurs personnes." (Mém. de l'Acad. de Bruxelles, vol. iii. p. 16.) It bears on this, that in all the customary law of the Netherlands, no preference was given to sex or primogeniture in succession (p. 21.).

But there were many other freemen in France, even in the tenth century, if we do not insist on the absolute and insulated independence which Guizot requires. "If we must understand," says M. Guérard (Cartulaire de Chartres, p. 34.) "by freemen those who enjoyed a liberty without restriction, that is, who owing no duties or service to any one, could go and settle wherever they pleased, they would not be found very numerous in our chartulary during the pure feudal regimen. But if, as we should, we comprehend under this name whoever is neither a noble nor a serf, the number of people in this intermediate condition was very considerable." And of these he specifies several varieties. This was in the eleventh century, and partly later, when the conversion of alodial property had been completed.

Savigny was the first who proved the Arimanni of

Lombardy to have been freemen, corresponding to the Rachinburgii of the Franks, and distinguished both from bondmen and from those to whom they owed obedience. Citizens are sometimes called Arimanni. The word occurs, though very rarely, out of Italy. (Vol. i. p. 176. English translation.) Guizot includes among the Arimanni the leudes or beneficiary vassals. See too Troja v. 146. 148. There seems, indeed, no reason to doubt that vassals, and other *commendati*, would be counted as Arimanni. Neither feudal tenure nor personal commendation could possibly derogate from a free and honourable *status*.

78.

TRIBUTARII, LIDI, COLONI.

Edit. 1826, p. 216. Edit. 1841, p. 145.

THESE names are too much confounded in the text, for they denote very different persons. The coloni were Romans, in the sense of the word then usual; that is, they were the cultivators of land under the empire, of whom we find abundant notice, both in the Theodosian Code and that of Justinian.* An early instance of this use of the word occurs in the Historiæ Augustæ Scriptores. Trebellius Pollio says, after the great victory of Claudius over the Goths, where an immense number of prisoners was taken—"Factus miles barbarus ac colonus ex Gotho;" an expression not clear, and which perplexed Salmasius. But it may perhaps be rendered, the barbarians partly entered the legions, partly cultivated the ground, in the rank of coloni. It is thus understood by Troja (ii. 705.). He conceives that a large proportion of the coloni, mentioned under the Christian emperors, were barbarian settlers (iii. 1074.). They came in the place of prædial slaves, who, though not wholly unknown, grew less common after the establishment of Christianity. The

* See Cod. Theod. l. v. tit. 9., with the copious Paratitlon of Gothofred.—Cod. Just. xi. tit. 47. *et alibi.*

Roman colonus was free; he could marry a free woman, and have legitimate children; he could serve in the army, and was capable of property; his peculium, unlike that of the absolute slave, could not be touched by his master. Nor could his fixed rent or duty be enhanced. He could even sue his master for any crime committed with respect to him, or for undue exaction. He was attached, on the other hand, to the soil, and might in certain cases receive corporal punishment. (Troja, iii. 1072.) He paid a capitation tax or census to the state, the frequent enhancement of which contributed to that decline of the agricultural population which preceded the barbarian conquest. Guizot, in whose thirty-seventh lecture on the Civilisation of France the subject is well treated, derives the origin of this state of society from that of Gaul before the Roman conquest. But since we find it in the whole empire, as is shown by many laws in the Code of Justinian, we may look on it perhaps rather as a modification of ancient slavery, unless we suppose *all* the coloni, in this latter sense of the word*, to have been originally barbarians, who had received lands on condition of remaining on them. But this, however frequent, seems a basis not quite wide enough for so extensive a tenure. Nor need we believe that the coloni were always raised from slavery; they might have descended into their own order, as well as risen to it. It appears by a passage in Salvian, about the middle of the fifth century, that many freemen had been compelled to fall into this condition; which confirms, by analogy, the supposition above-mentioned of M. Naudet, as to a similar degradation of a part of the Franks themselves after the conquest. It was an inferior species of commendation or vassalage, or more strictly, an analogous result of the state of society.

The forms of Marculfus, and all the documents of the following ages, furnish abundant proofs of the continuance of the coloni in this middle state between entire freedom

* The colonus of Cato and other classical authors was a free servant or farmer, as has been already mentioned.

and servitude. And these were doubtless reckoned among the "tributarii" of the Salic law, whose composition was fixed at forty-five solidi; for a slave had no composition due to his kindred; he was his master's chattel, and to be paid for as such. But the tributary was not necessarily a colonus. All who possessed no lands were subjected by the imperial fisc to a personal capitation. And it has appeared to us that the Romans in Gaul continued regularly to pay this under the house of Clovis. To these Roman tributaries the barbarian lidi seem nearly to have corresponded. This was a class, as has been already said, not quite freeborn; so that "Francus ingenuus" was no tautology, as some have fancied, yet far from slaves; without political privileges or rights of administering justice in the county court, like the Rachinburgii, and so little favoured that, while the Frank accused of a theft, that is, I presume, taken in the fact, was to be brought before his peers, the lidus, under the name of "debilior persona," which probably included the Roman tributary, was to be hanged on the spot. Throughout the Salic and Ripuarian codes, the ingenuus is opposed both to the lidus and to the servus; so that the threefold division is incontestable. It corresponds to the *edelingi*, *frilingi*, and *lazzi*, or the *eorl*, *ceorl*, and *thrall* of the northern nations. (Grimm, Deutsche Rechts Alterthümer, p. 306. *et alibi.*) The "coloni partiarii," frequently mentioned in the Theodosian Code, were *metayers;* and M. Guérard says that lands were chiefly held by such in the age of Charlemagne and his family. (Cart. de Chartres, i. 109.) The demesne lands of the manor, however, were never occupied by coloni, but by serfs or domestic slaves.

79.

SERVITUDE.

Edit. 1826, p. 218. • Edit. 1841, p. 146.

THE poor early felt the necessity of selling themselves for

subsistence in times of famine. "Subdiderunt se pauperes servitio," says Gregory of Tours, A.D. 585, "ut quantulumcunque de alimento porrigerent." (Lib. vii. c. 45.). This long continued to be the practice; and probably the remarkable number of famines which are recorded, especially in the ninth and eleventh centuries, swelled the sad list of those unhappy poor who were reduced to barter liberty for bread. Mr. Wright, in the thirtieth volume of the Archæologia (p. 223.), has extracted an entry from an Anglo-Saxon manuscript, where a lady, about the time of the Conquest, manumits some slaves, "whose heads," as it is simply and forcibly expressed, "she had taken for their meat in the evil days." Evil indeed were those days in France, when out of seventy-three years, the reigns of Hugh Capet and his two successors, forty-eight were years of famine. Evil were the days for five years from 1015, in the whole western world, when not a country could be named that was not destitute of bread. These were famines, as Radulfus Glaber and other contemporary writers tell us, in which mothers ate their children, and children their parents; and human flesh was sold, with some pretence of concealment, in the markets. It is probable that England suffered less than France; but so long and frequent a scarcity of necessary food must have affected, in the latter country, the whole organic frame of society.

It has been a very general opinion, that during the lawlessness of the ninth and tenth centuries, the aristocratic element of society continually gaining ground, the cultivators fell into a much worse condition, and either from freemen became villeins, or, if originally in the order of tributaries, became less and less capable of enjoying such personal rights as that state implied; that they fell, in short, almost into servitude. "Dans le commencement de la troisième race," says Montesquieu, "presque tout le bas peuple était serf." (Lib. 28. c. 45.) Sismondi, who never draws a favourable picture, not only descants repeatedly on this oppression of the commonalty, but traces it by the capitularies. "Les lois seules nous donnent quelque indication d'une

révolution importante à laquelle la grande masse du peuple fut exposée à plusieurs reprises dans toute l'étendue des Gaules,—révolution qui, s'étant opérée sans violence, n'a laissé aucune trace dans l'histoire, et qui doit cependant expliquer seule les alternatives de force et de foiblesse dans les états du moyen age. C'est le passage des cultivateurs de la condition libre à la condition servile. L'esclavage étant une fois introduite et protégée par les lois, la conséquence de la prospérité, de l'accroissement des richesses devait être toujours la disparition de toutes les petites propriétés, la multiplication des esclaves, et la cessation absolue de tout travail qui ne serait pas fait par des mains serviles." (Hist. des Français, vol. ii. p. 273.) Nor should we have believed, from the general language of historical antiquaries, that any change for the better took place till a much later era. We know indeed from history that, about the year 1000, the Norman peasantry, excited by oppression, broke out into a general and well-organized revolt, quelled by the severest punishments. This is told at some length by Wace, in the "Roman de Rou." And every inference from the want of all law, except what the lords exercised themselves, from the strength of their castles, from the fierceness of their characters, from the apparent inability of the peasants to make any resistance which should not end in greater sufferings, converges to the same result.

It is not therefore without some surprise that, in a recent publication, we meet with a totally opposite hypothesis on this important portion of social history. The editor of the Cartulaire de Chartres maintains, that the peasantry, at the beginning of the eleventh century, enjoyed rights of property and succession which had been denied to their ancestors; that the movement from the ninth century had been upwards; so that during that period of anarchy which we presume to have been exceedingly unfavourable to their privileges, they had in reality, by force, usage, or concession, gained possession of them. They could not indeed leave their lands, but they occupied them subject to known conditions.

The passage wherein M. Guérard, in a concise and perspicuous manner, has given his own theory as to the gradual decline of servitude deserves to be extracted; but I regret very much that he refers to another work, not by name, and unknown to me, for the full proof of what has the air of an historical paradox. With sufficient proof every paradox loses its name; and I have not the least right, from any deep researches of my own, to call in question the testimony which has convinced so learned and diligent an inquirer.

"La servitude, comme je l'ai exposé dans un autre travail, alla toujours chez nous en s'adoucissant jusqu'à ce qu'elle fut entièrement abolie à la chute de l'ancien régime: d'abord c'est l'esclavage à-peu-près pur, qui réduisait l'homme presque à l'état de chose, et qui le mettait dans l'entière dépendance de son maître. Cette période peut être prolongée jusqu'après la conquête de l'empire d'Occident par les Barbares. Depuis cette époque jusques vers la fin du règne de Charles-le-Chauve, l'esclavage proprement dit est remplacé par la servitude, dans laquelle la condition humaine est reconnue, respectée, protégée, si ce n'est encore d'une manière suffisante, par les lois civiles, au moins plus efficacement par celles de l'Eglise et par les mœurs sociales. Alors le pouvoir de l'homme sur son semblable est contenu généralement dans certains limites; un frein est mis d'ordinaire à la violence; la règle et la stabilité l'emportent sur l'arbitraire: bref, la liberté et la propriété pénètrent par quelque endroit dans la cabane du serf. Enfin, pendant le désordre d'où sortit triomphant le régime féodal, le serf soutient contre son maître la lutte soutenue par le vassal contre son seigneur, et par les seigneurs contre le roi. Le succès fut le même de part et d'autre; l'usurpation des tenures serviles accompagna celle des tenures libérales, et l'appropriation territoriale ayant eu lieu partout, dans le bas comme dans le haut de la société, il fut aussi difficile de déposséder un serf de son manse, qu'un seigneur de son bénéfice. Dès ce moment, la servitude fut transformée en servage; le serf ayant retiré sa personne et son champ des mains de son

maître, dut à celui-ci non plus son corps ni son bien, mais seulement une partie de son travail et de ses revenus. Dès ce moment il a cessé de servir ; il n'est plus en réalité qu'un tributaire.

" Cette grande révolution, qui tira de son état abject la classe la plus nombreuse de la population, et qui l'investit de droits civils, lorsque auparavant elle ne pouvait guère invoquer en sa faveur que les droits de l'humanité, n'avait pas encore été signalée dans notre histoire. Les faits qui la démontrent ont été développé dans un autre travail que je ne puis reproduire ici ; mais les traces seules qu'elle a laissées dans notre Cartulaire sont assez nombreuses et assez profondes pour la faire universellement reconnaître. Elle était depuis long-temps consommée, lorsque le moine rédigeait, dans la seconde moitié du XI^e^. siècle, la première partie du présent recueil, et lorsqu'il déclarait que les anciens rôles (écrits au IX^e^.) conservés dans les archives de l'Abbaye, n'accordent aux paysans ni les usages ni les droits dont ils jouissent actuellement. Mais ses paroles méritent d'être répétées : — ' *Lectori intimare curavi,*' dit il dans sa Préface, *quod ea quæ primo scripturus sum a præsenti usu admodum discrepare videntur ; nam rolli conscripti ab antiquis et in armario nostro nunc reperti, habuisse minime ostendunt illius temporis rusticos has consuetudines in reditibus quas moderni rustici in hoc tempore dinoscuntur habere, neque habent vocabula rerum quas tunc sermo habebat vulgaris.*' Ainsi, non seulement les choses, mais encore les noms, tout était changé." (Prolégomènes à la Cartulaire de Chartres, p. 40.)

The characteristic of the villein, according to Beaumanoir, in the thirteenth century, that his obligations were fixed in kind and degree, would thus appear to have been as old as the eleventh. Many charters of the tenth and eleventh centuries are adduced by M. Guérard, wherein, as he informs us — " On s'efforce de se soustraire à la violence, et d'y substituer les conventions à l'arbitraire ; la règle et la mésure tendent à s'introduire partout et jusques dans les extortions mêmes" (p. 109.). But this principle of limited rent was also that of the Roman system with

respect to the *coloni* before the conquest of Gaul by Clovis. Nor do we know that it was different afterwards. No law at least could have effected it; for the Roman law, by which the *coloni* were ruled, underwent no change.

M. Guérard seems hardly to have taken a just view of the *status* of the Roman tributary or colonus. "Nous avons dit que les personnes de condition servile s'étaient appropriés leurs bénéfices. Ce qui vient encore nous confirmer dans cette opinion, c'est le changement qu'on observe généralement dans la condition des terres depuis le déclin. du x^e^. siècle. La terre, après avoir été cultivée dans l'antiquité par l'esclave au profit de son maître, le fut ensuite par un espèce de fermier non libre qui partageait avec le propriétaire, ou qui faisait les fruits siens, moyennant certains cens et services, auxquels il était obligé envers lui: c'est l'état qui nous est representé par le Polyptyque d'Irminon, au temps de Charlemagne, et qui dura encore un siècle et demi environ après la mort de ce grand prince. Puis commence une troisième période, pendant laquelle le propriétaire n'est plus que seigneur, tandisque le tenancier est devenu lui-même propriétaire, et paie, non plus de fermages, mais seulement des droits seigneuriaux. Ainsi, d'abord obligations d'un esclave envers un maître; ensuite obligations d'un fermier non libre envers un propriétaire; enfin, obligations d'un propriétaire non libre envers un seigneur. C'est à la dernière période que nous sommes parvenus dans notre Cartulaire. Les populations s'y montrent en jouissance du droit de propriété, et ne sont soumises, à raison des possessions, qu'à de simples charges féodales."

It may be observed upon this, that the colonus was a free man, whether he divided the produce with his lord, like the *métayer* of modern times, or paid a certain rent; and, secondly, that, in what he calls the third period, the tenant, if he was a villein, or homme de poote, could not possibly be called "lui-même propriétaire;" nor were his liabilities feudal, but either a money-rent or personal service in labour; which cannot be denominated feudal without great impropriety.

"Il est vrai," he proceeds, "que ces charges sont encore lourdes et souvent accablantes, et que les biens ne sont pas plus que les personnes entièrement francs et libres; ni suffisamment à l'abri de l'arbitraire et de la violence; mais la liberté, acquise de jour en jour à l'homme, se communiquait de plus en plus à la terre. Le paysan étant propriétaire, il ne lui restait qu'à dégrever et affranchir la propriété. C'est à cet œuvre qu'il travaillera désormais avec persévérance et de toutes ses forces, jusqu'à ce qu'il ait enfin obtenu de ne supporter d'autres charges que celles qui conviennent à l'homme libre, et qui sont uniquement fondées sur l'utilité commune."

In this passage the tenant is made much more to resemble the free socager of England than the villein, or homo potestatis, of Pierre des Fontaines, or Beaumanoir. The class, however, was certainly numerous in their age, and could hardly have been less so some centuries before. These were subject to so many onerous restrictions, independent of their compulsory residence on the land, and independently also of their want of ability to resist undue exactions, that they were always eager to purchase their own enfranchisement. Their marriages were not valid without the lord's consent, till Adrian IV., in the twelfth age, declared them indissoluble. A freeman marrying a serf became one himself, as did their children. They were liable to occasional as well as regular demands, that is, to tallages, sometimes in a very arbitrary manner. It was probably the less frequency of such demands, among other reasons, that rendered the condition of ecclesiastical tenants more eligible than that of others. Manumissions of serfs by the Church were very common; and, indeed, the greater part that have been preserved, as may be expected, come from ecclesiastical repositories. It is observed in my text, that the English clergy are said to have been slow in liberating their villeins. But a villein in England was real property; and I conceive that a monastery could not enfranchise him, at least without the consent of some superior authority, any more than it could alienate its

lands. The Church were not generally accounted harsh masters.

80.

DIVISION OF THE POUND.

Edit. 1826, p. 235. Edit. 1841, p. 157.

IN every edition of this work, till that of 1846, a strange misprint has appeared of *twenty* instead of *twelve* ounces, as the division of the pound of silver. Most readers will correct this for themselves; but it is more material to observe that, according to what we find in the Mémoires de l'Acad. des Inscriptions (Nouvelle Série), vol. xiv. p. 234, the pound in the time of Charlemagne was not of 12 ounces, but of $13\frac{1}{3}$. We must, therefore, add one-ninth to the value of the sou, so long as this continued to be the case. I do not know the proofs upon which this assertion rests; but the fact seems not to have been much observed by those who had previously written upon the subject.

81.

NATIONAL ASSEMBLIES.

Edit. 1826, p. 239. Edit. 1841, p. 160.

THE national assemblies of the Field of March are supposed by many to have gone much into disuse under the later Merovingian kings. That of 615, the most important of which any traces remain, was at the close of the great revolution, which punished Brunehaut for aspiring to despotic power. Whether these assemblies were composed of any except prelates, great landholders, or what we may call nobles, and the Antrustions of the king, is still an unsettled point. Some have even supposed, since bishops are only mentioned by name in the great

statute of Clotaire II. in 615, that they were then present for the first time; and Sismondi, forgetting this fact, has gone so far as to think that Pepin first admitted the prelates to national councils.* But the constitutions of the Merovingian kings frequently bear upon ecclesiastical regulations, and must have been prompted at least by the advice of the bishops. Their influence was immense; and though the Romans generally are not supposed to have been admitted by right of territorial property to the national assemblies, there can be no improbability in presuming that the chiefs of the Church, especially when some of them were barbarians, stood in a different position. We know this was so at least in 615, and nothing leads to a conclusion that it was for the first time.

It is far more difficult to determine the participation of the Frank people, the alodialists or *Rachimburgii*, in these assemblies of the Field of March. They could not, it is said, easily have repaired thither from all parts of France. But while the monarchy was divided, and all the left bank of the Loire, in consequence of the paucity of Franks settled there, was hardly connected politically with any section of it, there does not seem an improbability that the subjects of a king of Paris or Soissons might have been numerously present in those capitals. It is generally allowed that they attended with annual gifts to their sovereign; though perhaps these were chiefly brought by the beneficiary tenants and wealthy alodialists. We certainly find expressions, some of which I have quoted, indicating a popular assent to the resolutions taken, or laws enacted, in the Field of March. Perhaps the most probable hypothesis may be that the presence of the na-

* Voltaire (Essai sur l'Histoire Universelle) ascribes this to the elder Pepin, surnamed Héristal, and quotes the Annals of Metz for 692; but neither under that year, nor any other, do I find a word to the purpose. Yet he pompously announces this as "an epoch not regarded by historians, but that of the temporal power of the Church in France and Germany." Voltaire knew but superficially the early French history, and amused himself by questioning the most public as well as probable facts, such as the death of Brunehaut. The compliment which Robertson has paid to Voltaire's historical knowledge is much exaggerated relatively to the mediæval period; the later history of his country he possessed very well.

tion was traditionally required in conformity to the ancient German usage, which had not been formally abolished; while the difficulty of prevailing on a dispersed people to meet every year, as well as the enhanced influence of the king through his armed Antrustions, soon reduced the freemen to little more than spectators from the neighbouring districts. We find indeed that it was with reluctance, and by means of coercive fines, that they were induced to attend the *mallus* of their count for judicial purposes.

Mably generally strives to make the most of any vestige of popular government, and Sismondi is not exempt from a similar bias. He overrates the liberties of the Franks. "Leurs ducs et leurs comtes étaient électifs; leurs généraux étaient choisis par les soldats, leur grands juges ou maires par les hommes libres" (vol. ii. p. 87.). But no part of these privileges can be inferred from the existing histories or other documents. The dukes and counts were, as we find by Marculfus and other evidence, solely appointed by the crown. A great deal of personal liberty may have been preserved by means of the local assemblies of the Franks; but we find in the general government only the preponderance of the kings during one period, and that of the aristocracy during another.

Although no legislative proceedings of the Merovingian line are extant after 615, it is intimated by early writers that Pepin Héristal and his son Charles Martel restored the national council after some interruption; and if the language of certain historians be correct, they rendered it considerably popular. The first of these Austrasian dukes, say the Annals of Metz, "Singulis annis in Kalendis Martii generale cum omnibus Francis, secundum priscorum consuetudinem, concilium agebat." The second, according to the biographer of St. Salvian—"jussit campum magnum parari, sicut mos erat Francorum. Venerunt autem optimates et magistratus, omnisque populus." See the quotations in Guizot. (Essais sur l'Hist. de France, p. 321.) Pepin the younger, after his accession to the throne, changed the month of this annual assembly from March

to May; and we have some traces of what took place at eight sessions during his reign. (Id. 324.) Of his capitularies however, one only is said to be made, *in generali populi conventu;* the rest are enacted in synods of bishops, and all without exception relate merely to ecclesiastical affairs. (Rec. des Hist. v. 637.) And it must be owned that, as in those of the first dynasty, we find generally mention of the optimates who met in these conventions, but rarely any word that can be construed of ordinary freemen.

82.

QUOTATION FROM HINCMAR.

Edit. 1826, p. 240. Edit. 1841, p. 161.

THERE would seem naturally little doubt that *majorum* can mean nothing but the higher classes of clergy and laity, exclusive of parish priests and ordinary freemen, were it not that a part of these very *majores* are afterwards designated by the name *minores*. Who, it may be asked, could be the *majores clerici*, except prelates and abbots? And of these, how could one be so inferior in degree to another, as to be reckoned among *minores?* It may perhaps be answered that there was nevertheless a difference of importance, though not of rank. Guizot translates *majores* "les grands," and *minores* "les moins considérables." But upon this construction, which certainly is what the words fairly bear, none but a class denominated *majores*, relatively to the rest of the nation, were members of the national council. I think, nevertheless, that Guizot, on any hypothesis, has too much depreciated the authority of these general meetings, wherein the capitularies of Charlemagne were enacted. Grant, against Mably, that they were not a democratic assembly; still were they not a legislature? "Lex consensu fit populi et constitutione regis." This is our own statute language; but does it make parliament of no avail? "En lui (Charlemagne) reside la volonté, et l'impulsion; c'est de lui que

tout émane pour revenir à lui." (Essais sur l'Hist. de France, p. 323.) This is only to say that he was a truly great man; and that his subjects were semi-barbarians, comparatively unfit to devise methods of ruling the empire. No one can doubt that he directed every thing; but a weaker sovereign soon found these rude nobles an overmatch for him. It is, moreover, well pointed out by Sir F. Palgrave, that we find instances of petitions presented by the lay or spiritual members of these assemblies to Charlemagne, upon which capitularies or edicts were afterwards founded. (English Commonwealth, ii. 411.) It is to be inferred, from several texts in the capitularies of Charlemagne and his family, that a general consent was required to their legislative constitutions, and that without this a capitulary did not become a law. It is not, however, quite so clear in what method this was testified; or rather two methods appear to be indicated. One was that above described by Hincmar, when the determination of the *seniores* was referred to the *minores* for their confirmation: "interdum pariter tractandum, et non ex potestate sed ex proprio mentis intellectu vel sententiâ confirmandum." The point of divergence between two schools of constitutional antiquaries in France is on the words *ex potestate*. Mably, and others whom I have followed, say "not by compulsion," or words to that effect. But Guizot renders the words differently: "quelquefois on délibérait aussi, et les confirmaient, non par un consentement formel, mais par leur opinion, et l'adhesion de leur intelligence." The Latin idiom will, I conceive, bear either construction. But the context, as well as the analogy of other authorities, incline me to the more popular interpretation, which, though the more popular, does not necessarily carry us beyond the word *majores*, taking that as descriptive of a numerous aristocracy.

If, indeed, we are so much bound by the word *majorum* in this passage of Hincmar, as to take for merely loose phrases the continual mention of the *populus* in the capitularies, we could not establish any theory of popular consent in legislation from the general placita held almost every

May by Charlemagne. They would be conventions of an aristocracy; numerous indeed, and probably comprehending by right all the vassals of the crown, but excluding the freemen or petty alodialists, not only from deliberating upon public laws, but from consenting to them. We find, however, several proofs of another method of obtaining the ratification of this class, that is of the Frank people. I do not allude to the important capitulary of Louis (though I cannot think that M. Guizot has given it sufficient weight), wherein the count is directed to bring twelve Scabini with him to the imperial placitum, because we are chiefly at present referring to the reign of Charlemagne; and yet this provision looks like one of his devising. The scheme to which I refer is different and less satisfactory. The capitulary determined upon by a national placitum, was sent round to the counts, who were to read it in their own *mallus* to the people, and obtain their confirmation. Thus in 803, "Anno tertio clementissimi domini nostri Karoli Augusti, sub ipso anno hæc facta capitula sunt, et consignata Stephano comiti, ut hæc manifesta faceret in civitate Parisiis mallo publico, et illa legere faceret coram Scabiniis, quod ita et fecit. Et omnes in uno consenserunt, quod ipsi voluissent omni tempore observare usque in posterum. Etiam omnes Scabinii, Episcopi, Abbates, Comites manu propria subter signaverunt." (Rec. des Hist. v. 663.) No text can be more perspicuous than this; but several other proofs might be given, extending to the subsequent reigns.

Sir F. Palgrave is, perhaps, the first who has drawn attention to this scheme of local sanction by the people; though I must think that he has somewhat obscured the subject by supposing the *malli*, wherein the capitulary was confirmed, to have been those of separate nations constituting the Frank empire, instead of being determined by the territorial jurisdiction of each count. He gives a natural interpretation to the famous words: "Lex consensu populi fit, constitutione regis." The capitulary was a constitution of the king, though not without the advice of his great men; the law was its confirmation by the nation

collectively, in the great placitum of the Field of March, or by separate consent and subscription in each county.

We are not, however, to be confident that this assent of the people in their county courts was virtually more than nominal. A little consideration will show that it could not easily have been otherwise, except in the strongest cases of unpopular legislation. No Scabini or Rachinburgii in one county knew much of what passed at a distance; and dissatisfaction must have been universal before it could have found its organ in such assemblies. Before that time arrived, rebellion was a more probable effect. One capitulary, of 823, does not even allude to consent: "In suis comitatibus coram omnibus relegant, ut cunctis nostra ordinatio et voluntas nota fieri possit." But we cannot set this against the language of so many other capitularies, which imply a formal ratification.

83.

SCABINI ELECTED BY ALODIAL PROPRIETORS.

Edit. 1826, p. 241. Edit. 1841, p. 161.

THIS had been a common supposition when this was written, but is not at all right. The Scabini have been confounded with the Rachinburgii, who also were not chosen by the alodial proprietors, but were themselves such, or sometimes perhaps beneficiaries, summoned by the Count as jurors were in England. They answered to the *prud' hommes, boni homines,* of later times; they formed the county or the hundred court, for the determination of civil and criminal causes. But the Scabini, from whose name the word *échevin* is formed, were permanent assessors to the count, elected by the freemen, generally upon his nomination, in the county court or mallus. This seems to be sufficiently proved by Savigny (vol. i. p. 192. 217, *et post*). His opinion is adopted by Meyer, Guizot, Grimm, and Troja. The last of these (v. 170.) has

found Scabini mentioned in Lombardy as early as 724; though Savigny had rejected all documents in which they are named, anterior to Charlemagne.

84.

HEREDITARY SUCCESSION.

Edit. 1826, p. 242. Edit. 1841, p. 162.

SISMONDI has gone a great deal farther down, and observes that, though John assumed the royal power immediately on the death of his father, in 1350, he did not take the name of king, nor any seal but that of duke of Normandy, till his coronation. He says, however, "notre royaume" in his instruments (x. 375). Even Charles V. called himself, or was called by some, duke of Normandy until his coronation; but all the lawyers called him king (xi. 6). The lawyers had established their maxim, that the king never dies; which, however, was unknown while any traces of elective monarchy remained.

85.

DAMPIERRE.

Edit. 1826, p. 248. Edit. 1841, p. 166.

IT has been suggested to me, that the lord of Dampierre was never count of Flanders; his second brother married the younger sister of the heiress of that fief, who, after his death, inherited it from the elder. The ordinance related to the domains of Dampierre, in the Nivernois. This, however, makes the instance stronger against the legislative authority of the crown, than as I had stated it.

86.

BEAUMANOIR.

Edit. 1826, p. 250. Edit. 1841, p. 168.

BEAUMANOIR uses in one place, which I had overlooked, still stronger language about the royal authority. The king, he says, may annul the releases of debts made by any one who accompanies him in military service, so that he may enforce them again; "for what it pleases him to do ought to be held as law," (c. 35.) This I owe to the new edition of the "Coûtumes de Beaumanoir," by M. Beugnot, 1842.

87.

PHILIP THE FAIR.

Edit. 1826, p. 252. Edit. 1841, p. 169.

THE reign of Philip the Fair has been very well discussed by Mably, Sismondi, and Guizot. "He changed," says the last, "monarchy into despotism; but he was not one of those despots who employ their absolute power for the public good. "On ne rencontre dans tout le cours de son règne aucune idée générale, et qui s'y rapporte au bien de ses sujets; c'est un despote égoïste, dévoué à lui-même, qui règne pour lui seul." (Leçon 45.) The royal authority gained so much ascendancy in his reign, that while we have only 50 ordonnances of St. Louis in forty-two years, we have 334 of Philip IV. in about thirty.

88.

STATES OF 1356.

Edit. 1826, p. 260. Edit. 1841, p. 174.

IT is singular that Sismondi says (x. 479.), with Sécousse before his eyes, that the *procès verbaux* of the States-General, in 1356 are not extant.

89.

JOURNAL OF THE STATES OF TOURS

Edit. 1826, p. 271. Edit. 1840, p. 182.

THIS manuscript was published in 1835, among the Documens Inédits sur l'Histoire de France.

90.

CHARTER OF DAGOBERT.

Edit. 1826, p. 273. Edit. 1841, p. 183.

IF a charter of Clovis to a monastery called Reomaense, dated 496, is genuine, the same words of exemption occurring in it, we must refer territorial jurisdiction to the very infancy of the French monarchy. And M. Lehuerou (Inst. Caroling. p. 225, *et post*) has strongly contended for the right of lords to exercise jurisdiction in virtue of their ownership of the soil, and without regard to the *personal law* of those coming within its scope by residence. This territorial right he deduces from the earliest times; it was an enlargement of the ancient *mundium*, or protection, among the Germans; which must have been solely personal before the establishment of separate property in land, but became local after the settlement in Gaul, to which that great civil revolution was due. The authority of M. Lehuerou is entitled to much respect; yet

his theory seems to involve a more extensive development of the feudal system in the Merovingian period than we generally admit.

91.

ESTABLISHMENTS OF ST. LOUIS.

Edit. 1826, p. 281. Edit. 1841, p. 188.

MONTESQUIEU supposes that the Establishments of St. Louis are not the original constitutions of that prince, but a work founded on them—a compilation of the old customs blended with his new provisions. (Esprit des Lois, xxviii. 37, 38.)

I do not know that any later inquirers have adopted this hypothesis.

92.

ROYAL COURT.

Edit. 1826, p. 286. Edit. 1841, p. 191.

THE court of the palace possessed a considerable jurisdiction from the earliest times. We have its judgments under the Merovingian kings. Thus in a diploma of Clovis III., A.D. 693, dated at Valenciennes —"Cum ad universorum causas audiendas vel recta judicia terminanda resideremus." (Rec. des Hist. iv. 672.) Under the house of Charlemagne it is fully described by Hincmar, in the famous passage above mentioned. It was not so much in form a court of appeal as one acting by the sovereign's authority, to redress the oppression of the subject by inferior magistrates. Mr. Allen has well rejected the singular opinion of Meyer, that an erroneous or corrupt judgment of the inferior court was not reversible by this royal tribunal, though the judges might be punished for giving it. (Inquiry into Royal Prerogative, Appendix,

p. 29.) Though, according to what is said by M. Beugnot, the appeal was not made in regular form, we cannot doubt that, where the case of injury by the inferior judge was made out, justice must be done by annulling his sentence. The emperor or king often presided here; or, in his absence, the count of the palace. Bishops, counts, household officers, and others constituted this court, which is not to be confounded with that of the seneschal, having only a local jurisdiction over the domains of the crown, and which did not continue under the house of Capet. (Beugnot, Régistres des Arrêts, vol. i. pp. 15. 18. in Documens Inédits, 1839.)

This tribunal, the court of the palace, was not founded upon any feudal principle; and when the right of territorial justice and the subordination of fiefs came to be thoroughly established, it ought, according to analogy, to have been replaced by one wherein none but the great vassals of France should have sat. Such, however, was not the case. This is a remarkable anomaly, and a proof that the spirit of monarchy was not wholly extinguished. For, weak as was the crown under the first Capets, their court, though composed of persons by no means the peers of all who were amenable to it, gave several judgments affecting some considerable feudataries, such as the count of Anjou under Robert. (Id. p. 22.). No court composed only of great vassals appears in the eleventh or twelfth centuries; no notion of judicial subordination prevailed; the vassals of the crown sat with those of the duchy of France; and latterly even clerks came in as assessors or advisers, though without suffrage (p. 31.). But an important event brought forward, for the first time, the true feudal principle. This was the summons of John, as duke of Normandy, to justify himself as to the death of Arthur. It has been often said, that twelve peers of France had appeared at the coronation of Philip-Augustus, in 1179. This, however, a late writer has denied, and does not place them higher than the proceedings against John, in 1201. (Id. p. 44.) In civil causes, as has above been said, there had been several instances wherein the king's

court had pronounced judgment against vassals of the crown. The idea had gained ground that the king, by virtue of his full prerogative, communicated to all who sat in that court a portion of his own sovereignty. Such an opinion would be sanctioned by the bishops, and by all who leaned towards the imperial theory of government, never quite eradicated in the Church. But the high rank of John, and the important consequences likely to result from his condemnation, forbad any irregularity of which advantage might be taken. John is always said to have been sentenced, "judicio parium suorum;" whence we may conclude that inferior lords did not take a part. (Id. ibid.) And from that time we find abundant proofs of the peerage of France, composed of six lay and six spiritual persons; though upon this supposition Normandy was never a substantial member of that class, having only appeared for a moment, to vanish in the next by its reunion to the domain.

The feudal principle seemed now to have recovered strength; a right which the vassals had never enjoyed, though in consistency their due, was formally conceded. But it was too late in the thirteenth century to render any new privilege available against the royal power. Though it was from that time an uncontested right of the peers to be tried by some of their order, this was construed so as not to exclude others, in any number, and with equivalent suffrage. One or more peers being present, the court was, in a later phrase, "suffisamment garnie de pairs;" and thus the lives and rights of the dukes of Guienne or Burgundy were at the mercy of mere lawyers.

93.

MUNICIPAL INSTITUTIONS.

Edit. 1826, p. 297. Edit. 1841, p. 200.

SAVIGNY, in his History of Roman Law in the Middle Ages, and Raynouard, in his Histoire du Droit Municipal

(1828), have, since the first publication of this work in 1818, traced the continuance of municipal institutions, in several French cities, from the age of the Roman empire to the twelfth century, when the formal charters of communities first appear. But it will render the subject clearer, if we look at the constitution which Rome gave to the cities of Italy, and ultimately of the provinces. We are not concerned with the privileges of Roman citizenship, whether local or personal, but with those appertaining to each city. These were originally founded on the republican institutions of Rome herself; the supreme power, so far as it was conceded, and the choice of magistrates rested with the assembly of the citizens. But after Tiberius took this away from the Roman comitia to vest it in the senate, it appears that, either through imitation, or by some imperial edict, this example was followed in every provincial city. We find everywhere a class named "curiales," or "decuriones" (synonymous words), in whom, or in those elected by them, resided whatever authority was not reserved to the proconsul or other Roman magistrate. Though these words occur in early writers, it must be admitted that our chief knowledge of the internal constitution of provincial cities is derived from the rescripts of the later emperors, especially in the Theodosian Code.

The decurions are several times mentioned by Pliny. In Greek or Asiatic towns, the word βούλη answered to curia, and βουλεύτης to decurio. Pliny refers to a lex Pompeia, probably of the great Pompey, which appears to have regulated the internal constitution, at least of the Pontic and Bithynian cities. According to this, the members of the council, or βούλη, were named by certain censors, to whose list the emperor, in the time of Pliny, added a few by especial favour. (Plin. Epist. x. 113.) In later times, the decurions are said to have chosen their own members; which can mean little more than that the form of election was required, for birth or property gave an inchoate title. They were a local aristo-

cracy*, requiring perhaps originally the qualification of wealth, which, in the time of Pliny, at least in Asia, was of a hundred thousand sesterces, or about 800*l.* (Epist. i. 19.) But latterly it appears that every son of a decurion inherited the rights, as well as the liabilities, of his father. We read, "qui origine sunt curiales," and "honor quem nascendo meruit." Property, however, gave a similar title; every one possessing twenty-five jugera of freehold, ought to be inscribed in the order. This title, honourable to Roman ears, *ordo decurionum*, or simply *ordo*, is always applied to them; and it may be observed, by the way, that the word "order" was used as descriptive of the Christian clergy, by analogy to this abbreviated expression. They were summoned on the Kalends of March to choose municipal officers, of whom the most remarkable were the duumvirs, answering to the consuls of the imperial city. These possessed a slight degree of civil and criminal jurisdiction, and were bound to maintain the peace. They belonged, however, only to cities enjoying the *jus Italicum*, a distinction into which we need not now inquire; and Savigny maintains that, in Gaul especially, which we chiefly regard, no local magistrate, in a proper sense, ever existed; the whole jurisdiction devolving on the imperial officers. This is far from the representation of Raynouard, who, though writing after Savigny, seems ignorant of his work, nor has it been adopted by later French inquirers.

But another institution is highly remarkable, and does peculiar honour to the great empire which established it, that of Defensor Civitatis — a standing advocate for the city against the oppression of the provincial governor. His office is only known by the laws from the middle of the fourth century, the earliest being of Valentinian and Valens, in 365; but both Cicero (Epist. xii. 56.) and Pliny (Epist. x. 3.) mention an Ecdicus with something

* Though I use this word, which expresses a general truth, yet, in strictness of law, the decurions were "nullâ prædîti dignitate." (Cod. Theod. 12. 1. 6.)

like the same functions; and Justinian always uses that word to express the Defensor Civitatis. He was chosen for five years, not by the curiales, but by the citizens at large. Nor could any decurion be defensor; he was to be taken "ex aliis idoneis personis;" which Raynouard translates, "among the most distinguished *inhabitants;*" a sense neither necessary nor probable. (Cod. Theod. i. tit. xi. Ducange. Troja, iii. 1066. Raynouard, i. 71.)

The duties of the defensor will best appear by a passage in a rescript of A. D. 385, inserted in the Code of Justinian:—"Scilicet, ut in primis parentis vicem plebi exhibeas, descriptionibus rusticos urbanosque non patiaris affligi; officialium insolentiæ et judicum procacitati, salva reverentia pudoris, occurras; ingrediendi cum voles ad judicem liberam habeas facultatem; super exigendi damna, vel spolia plus petentium ab his quos liberorum loco tueri debes, excludas [*sic*]; nec patiaris quidquam ultra delegationem solitam ab his exigi, quos certum est nisi tali remedio non posse reparari." (Cod. i. 55. 4.) But the Defensores were also magistrates and preservers of order:—"Per omnes regiones in quibus fera et periculi sui nescia latronum fervet insania, probatissimi quique et districtissimi defensores adsint disciplinæ, et quotidianis actibus præsint, qui non sinant crimina impunita coalescere; removeant patrocinia quæ favorem reis, et auxilium scelerosis impartiendo, maturari scelera fecerunt. (Id. i. 55. 6. See, too, Cod. Theod. *ubi supra.*)

It may naturally be doubted whether the principles of freedom and justice, which dictated these municipal institutions of the empire, were fully carried out in effect. Perhaps it might be otherwise, even in the best times — those of Trajan and the Antonines. But, in the decline of the empire, we find a striking revolution in the condition of the decurions. Those evil days rendered necessary an immense pressure of taxation; and the artificial scheme of imperial policy, introduced by Diocletian, and perfected by Constantine, had for its main object to drain the resources of the provinces for the imperial treasury. The decurions were made liable to such heavy burthens,

their responsibility for local as well as public charges was so extensive (in every case their private estates being required to make up the deficiency in the general tax), that the barren honours of the office afforded no compensation, and many endeavoured to shun them. This responsibility, indeed, of the decurions, and their obligation to remain in the city of their domicile, as well as their frequent desire to escape from the burthens of their lot, is manifest even in the Digest; that is, in the beginning of the third century (when the opinions of the lawyers therein collected were given), while the empire was yet unscathed; but the evil became more flagrant in subsequent times. The laws of the fourth and fifth centuries, in the Theodosian Code, perpetually compel the decurions, under severe penalties, to remain at home, and undergo their onerous duties. These laws are 192 in number, filling the first title of the twelfth book of that Code. Guizot indeed, Savigny, and even Raynouard (though his bias is always to magnify municipal institutions), have drawn from this source such a picture of the condition of the decurions in the last two centuries of the western empire, that we are almost at a loss to reconcile this absolute impoverishment of their order with other facts which apparently bear witness to a better state of society. For, greatly fallen as the decurions of the provincial cities must be deemed, in comparison with their earlier condition, there was still, at the beginning of the fifth century, especially in Gaul, a liberal class of good family, and not of ruined fortunes, dwelling mostly in cities, or sometimes in villas or country houses not remote from cities, from whom the Church was replenished, and who kept up the politeness and luxury of the empire.* The senators or senatorial families are often mentioned; and by the latter term we perceive that an hereditary nobility, whatever might be the case with some of the

* The letters of Sidonius Apollinaris bear abundant testimony to this, even for his age, which was after the middle of the century; and the state of Gaul must have been much better before. Salvian, too, in his declamation against the vices of the provincials, gives us to understand that they were the vices of wealth.

barbarian nations, subsisted in public estimation, if not in privilege, among their Roman subjects. The word senate appears to be sometimes used for the curia at large*; but when we find *senatorius ordo*, or *senatorium genus*, we may refer it to the higher class, who had served municipal offices, or had become privileged by imperial favour, and to whom the title of "clarissimi" legally belonged. It seems probable that this appellative senator, rather than senior, has given rise to seigneur, sire, and the like, in modern languages. The word *senatorius* appears early to have acquired the meaning, noble or gentlemanlike; though I do not find this in the dictionaries. This is, I conceive, what Pliny means by the "quidam senatorius decor," which he ascribes to his young son-in-law Acilianus. (Epist. i. 14.) It is the *air noble*, the indescribable look, rarely met with except in persons of good birth and liberal habits. In the age of Pliny this could only refer to the Roman senate.†

A great number of laws in this copious title of the Theodosian Code, many of which are cited by Raynouard (vol. i. p. 80.), manifest a distinction between the curia and the senate, or, as it is sometimes called, "nobilissima curia;" and though perhaps, in certain instances, they may be referred to the great senates of Rome or Constantinople, which were the fountains of all provincial dignity of this kind, there are others which can only be explained on the supposition that they relate to decurions, as it were *emeriti*, and promoted to a higher rank. Thus one of Valentinian and Valens, in 364, which is the earliest that seems explicit: — "Nemo

* This was rather by analogy than in strictness: thus, "Sue. *si sic dici oportet*, curiæ senatorem. (Lib. 12. tit. 1. lex 85.) But perhaps the language in different parts of the empire, or in different periods, might not be the same. The law just cited is of Arcadius. But Majorian says, in the next age and in the West, of the curiales, "Quorum cœtum recte appellavit antiquitas minorem senatum." (Gothofred, in leg. 85. suprà citat.) Some modern writers too much confound all who are denominated senators with the curiales.

† I presume that Sidonius Apollinaris means something complimentary, where he says — "Prandebamus breviter, copiose, *senatorium ad rem*; quo insitum institutumque multas epulas paucis paropsidibus apponi." — Epist. ii. 9.

ad ordinem senatorium ante functionem omnium munerum municipalium senator accedat. Cum autem universis transactis, patriæ stipendia fuerit emensus, tum eum ita ordinis senatorii complexus excipiet, ut reposcentium civium flagitatio non fatiget." (Lex. lvii.) The second title of the sixth book of the Theodosian Code, "De Senatoribus," is unfortunately lost; but Gothofred has restored a Paratitlon from other parts of the same code, and especially from the title above mentioned, in the twelfth book, by reference to which this part of the imperial constitution will be best understood. It appears difficult to explain every passage. But on the whole we cannot hesitate to agree with Guizot and Savigny, that the name of senator was given to a privileged class in the provincial cities, who having served through all the public functions of the curia, were entitled to a legal exemption in future, and ascended to the dignity of "clarissimi." Many others, independent of the decurions, obtained this rather by the emperor's favour, or by the performance of duties which regularly led to it. They were nominated by the emperor, and might be removed by him; but otherwise their rank was hereditary. Those decurions, therefore, who could bear the burthens of municipal liabilities without impoverishment, rose so far above them, that their families were secure in wealth as well as privilege. Thus the word senator must be taken, in relation to them, as merely an aristocratic distinction, without regard to its original sense.* It is sufficiently clear that senatorial families, by whatever means separated from the rest, constituted the nobility of Gaul. Thus we read in Gregory of Tours (lib. ii. c. 21. *sub ann.* 475.)—"Sidonius vir secundum sæculi dignitatem nobilissimus, et de primis Galliarum senatoribus, ita ut filiam sibi Aviti imperatoris in matrimonio sociârit." Another is called, "vir valde nobilis et de primis senatoribus Galliarum." Other pas-

* For this distinction between *curiales* and *senatores*, the reader may consult the title of the Theodosian code on Decurions, above cited, Leg. 82. 90. 93. 108, 110, 111. 118. 122. 129, 130. 180. 182, 183.; all of which throw some light upon, or relate to, this rather obscure subject. Guizot, Savigny, and Raynouard are the modern guides.

sages from the same historian might be adduced. But this is not to our immediate purpose, which is to trace briefly the state of municipal institutions in Gaul. The senatorial order, or Roman provincial nobility, of which we have just been speaking, is different.

Raynouard, the diligent elucidator of this great question, answers the very specious objection of Mably, drawn from the silence of the capitularies, which, though addressed to many classes of magistrates, never mention any peculiar to the cities, by observing that these capitularies were not designed for those who lived by the Roman law. (Vol. ii. p. 160.) Savigny had already made the same remark. There seems to be some force in this answer; and at least it is impossible to argue with Mably, from a negative probability, against the indisputable evidence that the municipal magistrates of some cities were in being. It may be justly doubted, indeed, whether they possessed a considerable authority. Subject to the count, as the great depositary of royal power, they would not perhaps be held worthy of receiving immediate commands from the sovereign in the national council. Troja speaks with contempt of these "curiæ," whose chief business was to register testaments and witness deeds: "Son sempre i medesimi ed anche derisorj i ricordi delle curie, ridotte alle funzioni di registrar testamenti, donazioni e contratti, o ad elegger magistrati che non poteano difendere il Romano dalle violenze dei Franchi, senza l' intervenzione de' vescovi di sangue Romano, o di sangue barbarico; ma in vano si cercherebbe la vita e la possanza della curia Romana in questi vani simulacri." (Vol. i. part v. p. 133.) They might be nevertheless quite as important as under the later emperors.

It is not necessary to conclude that every city in which the curia or the defensor subsisted during the imperial government, retained those institutions throughout the domination of the Franks. It appears that the functions of "defensor civitatis," that is to say, the protection of the city against arbitrary acts of the provincial governors, and the exercise of jurisdiction within its boundaries, frequently devolved upon the bishop. It is impossible not to recog-

nize the efficacy of episcopal government in sustaining municipal rights during the first dynasty. The bishops were a link, or rather a shield, between the barbarians who respected them, and the people whom they protected, and to whose race they, for a long time, commonly belonged. But the bishop was legally, and sometimes actually, elected, as the defensor had been, by the people at large. This, indeed, ceased to be the case before the reign of Charlemagne; and the crown, or (in the progress of the feudal system) its chief vassals, usurped the power of nomination, though the formality of election was not abolished. Certain it is, that from this analogy to the defensor, and from the still closer analogy to the feudal vassal, after royal grants of jurisdiction and immunity became usual, not less than by the respect due to his station, the bishop became as much the civil governor of his city, as the count was of the rural district.

This was a great revolution in the internal history of cities, and one which generally led to the discontinuance of their popular institutions; so that after the reign of Charlemagne, if not earlier, we may perhaps consider a municipality choosing its own officers, as an exception, though not a very unfrequent one, to the general usage. But instances of this are more commonly found to the south of the Loire, where Roman laws prevailed, and the feudal spirit was less vigorous, than in the northern provinces. Thus Raynouard has deduced the municipal government of ten cities from the fifth to the twelfth century. Seven of these are of the south—Perigueux, Bourges, Arles, Nismes, Marseilles, Toulouse, and Narbonne; three only of the north —Paris, Rheims, and Metz. (Vol. ii. p. 177.) It seems, however, more than probable, that these were not the whole; even in the north, Meaux and Chalons might be added, and, what in early times was undoubtedly to be reckoned a Frank city, Cologne. The corporate character of many of these is displayed by their coins. "Civitas Massiliensis," or "Narbonensis," will be found on the reverse of pieces bearing the heads of the French kings of the three dynasties, especially under Louis the Debonair, and Charles the

Bald (p. 152.). But it seems to me that the evidence of a popular assembly or *curia*, even in Rheims, which has always been wont to boast peculiarly of the antiquity of her privileges, is weak comparatively with what M. Raynouard has alleged for the cities of Provence. As to Paris, it is absolutely none at all. This assembly appears to have hardly survived in the north of France, and to have been replaced by *scabini*. These were originally chosen by the citizens, but gradually on the bishop's nomination. Those of Rheims appear in 847, exercising their functions under an officer of the archbishop. (Archives Administratifs de la Ville de Rheims, Preface, p. 7. in Documens Inédits, 1839.) The editor, however (M. Varin), inclines to adopt the theory of a Roman origin for the privileges of that city. The citizens called themselves in 991, addressing the archbishop, "cives tui;" whence M. Varin infers that they took an oath of allegiance to that prelate, and that their claims to a prescriptive independence must be given up. (Vol. I. p. 156.) Such independence (that is, of all but the sovereign) can at most only be admitted as to the great cities of Provence and Languedoc, which, in the twelfth and thirteenth centuries, entered into treaties with foreign powers, and conducted themselves as independent republics, though perhaps under the nominal superiority of the counts. Emulous, as it appears, of Italian liberty, they adopted the government by consuls elected by the community. And this honourable title was given to the chief magistrates in most cities south of the Loire, though a different system, as we shall see, prevailed on the other bank.

It is evident that if extensive privileges of internal government had been preserved in the north of France, there could have been no need for that great movement towards the close of the eleventh century, which ended in establishing civic freedom; much less could the contemporary historians have spoken of this as a new era in the state of France, The bishops were now almost sovereign in their cities; the episcopal, the municipal, the feudal titles, conspired to enhance their power; and from being the pro-

tectors of the people, from the glorious office of *defensores civitatis*, they had, in many places at least, become odious by their own exactions. Hence the citizens of Cambray first revolted against their bishop in 957, and, after several ineffectual risings, ultimately constituted themselves into a community in 1076. The citizens of Mans, about the latter time, had the courage to resist William, duke of Normandy; but this generous attempt at freedom was premature. The cities of Noyon, Beauvais, and St. Quentin, about the beginning of the next century, were successful in obtaining charters of immunity and self-government from their bishops; and where these were violated, on one side or the other, the king, Louis VI., came in to redress the injured party, or to compose the dissensions of both. Hence arose the royal charters of the Picard cities, which soon extended to other parts of France, and were used as examples by the vassals of the crown. This subject, and especially the struggles of the cities against the bishops before the legal establishment of communities by charter, is abundantly discussed by M. Thierry, in his Lettres sur l'Histoire de France. But even where charters are extant, they do not always create an incorporated community, but, as at Laon, recognise and regulate an internal society already established. (Guizot, Civilisation en France, Leçon 47.)

We must here distinguish the cities of Flanders and Holland, which obtained their independence much earlier; in fact, their self-government goes back beyond any assignable date. (Sismondi, iv. 432.) They appear to have sprung from a distinct source, but still from the great reservoir of Roman institutions. The cities on the Rhine retained more of their ancient organisation than we find in northern France. The Roman language, says Thierry, had here perished; the institutions survived. At Cologne we find from age to age a corporation of citizens exactly resembling the *curia*, and whose members set up hereditary pretensions to a Roman descent; we find there a particular tribunal for the "cessio bonorum," a part of Roman law unknown to the old jurisprudence of

Germany as much as to that of the feudal system. In the twelfth century the free constitution of Cologne passed for ancient. From Cologne and Trèves, municipal rights spread to the Rhenish cities of less remote origin, and reached the great communities of Flanders and Brabant. Thierry has quoted a remarkable passage from the Life of the Empress St. Adelaide, who died in 999, whence we may infer the continuance, at least in common estimation, of Roman privileges in the Rhenish cities. "Ante duodecimum circiter annum obitûs sui, in loco qui dicitur Salsa (Seltz in Alsace), urbem decrevit fieri *sub libertate Romanâ*, quem affectum postea ad perfectum perducit effectum. (Récits des T. M. i. 274.)

But the acuteness of this writer has discovered a wholly different origin for the communes in the north of France. He deduces them from the old Teutonic institution of guilds, or fraternities by voluntary compact, to relieve each other in poverty, or to protect each other from injury. Two essential characteristics belonged to them; the common banquet, and the common purse. They had also in many instances a religious, sometimes a secret, ceremonial to knit more firmly the bond of fidelity. They became, as usual, suspicious to governments, as several capitularies of Charlemagne prove. But they spoke both to the heart and to the reason in a voice which no government could silence. They readily became connected with the exercise of trades, with the training of apprentices, with the traditional rules of art. We find them in all Teutonic and Scandinavian countries; they are frequently mentioned in our Anglo-Saxon documents, and are the basis of those corporations which the Norman kings recognised or founded. The guild was, of course, in its primary character a personal association; it was in the state, but not the state; it belonged to the city without embracing all the citizens; its purposes were the good of the fellows alone. But when their good was inseparable from that of their little country, their walls and churches, the principle of voluntary association was readily extended; and from the private guild, possessing already the vital

spirit of faithfulness and brotherly love, sprung the sworn community, the body of citizens, bound by a voluntary but perpetual obligation to guard each other's rights against the thefts of the weak or the tyranny of the powerful.

The most remarkable proof of this progress from a merchant guild to a corporation, is exhibited in the local history of Paris. No mention of a *curia* or Roman municipality in that city has been traced in any record: we are driven to Raynouard's argument — *Could* Paris be destitute of institutions which had become the right of all other cities in Gaul? A couple of lines, however, from the poem of Gulielmus Brito, under Philip Augustus, are his only proof (vol. ii. p. 219.). But at Paris there was a great college or corporation of *nautæ* or *marchands d'eau;* that is, who supplied the town with commodities by the navigation of the Seine.* These, indeed, do not seem to be traced very far back, but the necessary documents may be deficient. They appear abundantly in the twelfth century, with a provost and *scabini* of their own. And to this body the kings in that age conceded certain rights over the inhabitants. The arms borne by the city, a ship, are those of the college of *nautæ*. The subsequent process by which this corporation slid into a municipality is not clearly developed by the writer to whom I must refer.

Thus there were several sources of the municipal institutions in France; first, the Roman system of decurions, handed down prescriptively in some cities, but chiefly in the south; secondly, the German system of voluntary societies or guilds, spreading to the whole community for a common end; thirdly, the forcible insurrection of the inhabitants against their lords or prelates; and lastly, the charters, regularly granted by the king or by their immediate superior. Few are likely now to maintain the

* If an inscription quoted by the editors of Ducange, voc. Nautæ, be genuine, the Nautæ Parisiaci existed as a corporate institution under Tiberius. But this must primâ facie be suspicious in no trifling degree.

old theory of Robertson, that the kings of France encouraged the communities, in order to make head with their help against the nobility, which a closer attention to history refutes. We must here, however, distinguish the corporate towns or communities from another class, called burgages, *bourgeoisies*. The châtelains encouraged the growth of villages around their castles, from whom they often derived assistance in war, and conceded to these burgesses some privileges, though not any municipal independence.

Guizot observes, as a difference between the curial system of the empire and that of the French communes in the twelfth century, that the former was aristocratic in its spirit; the decurions filled up vacancies in their body, and ultimately their privileges became hereditary. But the latter were grounded on popular election, though with certain modifications as to eligibility. Yet some of the aristocratic elements continued among the communes of the south. (Leçon 48.)

It is to be confessed that while the kings, from the end of the thirteenth century, altered so much their former policy as to restrain, in great measure, and even in some instances to overthrow the liberties of French cities, there was too much pretext for this in their lawless spirit and proneness to injustice. The better class, dreading the populace, gave aid to the royal authority, by admitting bailiffs and provosts of the crown to exercise jurisdiction within their walls. But by this the privileges of the city were gradually subverted. (Guizot, Leçon 49. Thierry, Lettre xiv.) The ancient registers of the parliament of Paris, called Olim, prove this continual interference of the crown to establish peace and order in towns, and to check their encroachment on the rights of others. "Nulle part," says M. Beugnot, "on ne voit aussi bien que les communes étaient un instrument puissant pour opérer dans l'état de grands et d'heureux changemens, mais non une institution qui eut en elle-même des conditions de durée." (Régistres des Arrêts, vol. i. p. 192. in Documens Inédits, 1839.)

A more favourable period for civic liberty commenced and possibly terminated with the most tyrannical of French kings, Louis XI. Though the spirit of rebellion, which actuated a large part of the nobles in his reign, was not strictly feudal, but sprung much more from the combination of a few princes, it equally put the crown in jeopardy, and required all his sagacity to withstand its encroachments. He encouraged, therefore, with a policy unusual in the house of Valois, the Tiers Etat, the middle orders, as a counterpoise. What has erroneously been said of Louis VI. is true of his subtle descendant. "His ordinances," it is remarked by Sismondi (xiv. 314.), "are distinguished by liberal views in government. He not only gave the citizens, in several places, the choice of their magistrates, but established an urban militia, training the inhabitants to the use of arms, and placing in their hands the appointment of officers." And thus, at the close of our mediæval period, we leave the municipal authority of France in no slight vigour. It may only be added that, for miscellaneous information as to the French communes, the reader should have recourse to that great repository of curious knowledge, the "Histoire des Français, par Monteil, Siècle XV."

The continuance of Italian municipalities has been more disputed of late than that of the French, which both Savigny and Raynouard have placed beyond question. The former of these writers maintains, that not only under the Ostrogoths and Greeks (the latter indeed might naturally be expected), we have abundant testimony to the *ordo decurionum* and other Roman institutions in the Italian cities, but that, even under the Lombard dominion, the same privileges were unimpaired, or at least not subverted. This is naturally connected with the general question as to the condition of the natives in that period; those who deny them any rights of citizenship or even protection by the law, will not be inclined to favour the supposition of an internal jurisdiction. Troja accordingly, following older writers, rejects the notion of civic government in those cities which endured the Lombard yoke,

and elaborately refutes the proofs alleged by Savigny. In this, however, he does not seem always successful; but the early records of Italian communities are by no means so decisive as those that we have found in France.

Liutprand, as Troja conceives, established communities of Lombards alone. But he suggests that even before the reign of Liutprand, there may have been such a district government as we find mentioned by Tacitus among the Germans; and this might possibly be denominated by the Lombards *curia* or *ordo*, in imitation of the Roman names. If therefore, we meet with these terms in the laws or records of Italy before Charlemagne, there is no reason why they should not relate to Lombards (p. 125.). This is hardly, perhaps, a conjecture that will be favoured. Charlemagne, however, when he introduced the distinction of personal law, constituted in every city a new Lombard community, taking its name from the most numerous people, but in which each nation chose its own *scabini* or judges (p. 295.).

94.

COMPAGNIES D'ORDONNANCE.

Edit. 1826, p. 317. Edit. 1841, p. 202.

SISMONDI observes (vol. xiii. p. 352.) that very little is to be found in historians about the establishment of these compagnies d'ordonnance, though the most important event in the reign of Charles VII. The old soldiers of fortune who pillaged the country, either entered into these companies or were disbanded, and after their dispersion were readily made amenable to the law. This writer is exceedingly full on the subject.

CHAP. III.

ITALY.

95.

BERENGER.

Edit. 1826, p. 327. Edit. 1841, p. 220.

BERENGER being grandson, by a daughter, of Louis the Debonair, may be reckoned of the Carlovingian family. He was a Frank *by law*, according to Troja, who denies to him and his son, Berenger II., the name of Italians. It was Otho I. that put an end to the Frank dominion. (Storia d'Italia, v. 357.)

"Or già tutto all' apparir degli Ottoni si cangia da capo in Italia, nel modo stesso che tutto erasi cangiato alla venuta de' Franchi. Le città Longobarde prendono altra faccia, la possanza de' vescovi s' aumenta, i patti fra il sacerdozio e l' imperio guardano a più vasto scopo, ed i pontifici Romano sono dalla forza delle cose chiamati a tenere il freno intellettuale della cività de' popoli di tutta Europa." Troja deduces the Italian communes—"dopo il mille" from a German rather than a Roman origin. "Là sono veramente i comuni dov' è la spada per difendergli; ma nel regno Longobardico da lunga stagione la spada più non pendeva dal fianco del Romano." (p. 368.)

96.

NOBLES EXCLUDED FROM TRADE.

Edit. 1826, p. 483. note †. Edit. 1841, p. 323. note *.

THIS prohibition was by a law, the date of which has been disputed, but enacted, according to Daru, in 1400. It

was little regarded; the nobility have almost always partaken of the profits of trade by secret partnership with merchants. (Hist. de Venise, vol. i. p. 589.)

97.

FALL OF VENICE.

Edit. 1826, p. 485. Edit. 1841, p. 325.

THE circumstances to which Venice was reduced in her last agony by the violence and treachery of Napoleon, and the apparent impossibility of an effective resistance, so fully described by Daru, and still better by Botta, induce me to modify the severity of this remark. I should add, that the last doge, Manini, is not buried in the church of the Scalzi, as by a lapse of memory I have said in my note, but in that of the Jesuits. The former church was built by the contribution of noble families, among others the Manini, who have their own chapel, and most of whom are interred therein.

98.

REVENUES OF VENICE.

Edit. 1826, p. 489. Edit. 1841, p. 327.

I SUSPECT that 1,000,000 ducats is a mistake of the printer, overlooked at the moment, and running through all the editions. For I find the figures in Daru, and on reference, in Sanuto himself, to be 1,654,000. The calculations, however, are so strange and manifestly inexact, that they deserve little regard. Daru has given them more at length (Hist. de Venise, vol. ii. p. 205.) The revenues of Venice, which had amounted to 996,290 ducats in 1423, were but 945,750 in 1469, notwithstanding her acquisition, in the mean time, of Brescia, Bergamo, Ravenna, and Crema. (Id. ii. 462.) They increased con-

siderably in the next twenty years. The taxes, however, were light in the Venetian dominions; and Daru conceives the revenues of the republic, reduced to a corn price, to have not exceeded the value of 11,000,000 francs at the present day (p. 542.).

99.

STATISTICAL ESTIMATES.

" Edit. 1826, p. 533. Edit. 1841, p. 356.

THESE estimates are not quite accurate as to Venice, and probably much less so as to other states.

CHAP. IV.

SPAIN.

100.

COUNT JULIAN.

Edit. 1826, vol. ii. p. 3. Edit. 1841, vol. i. p. 369.

The story of Cava, daughter of Count Julian, whose seduction by Roderic, the last Gothic king, impelled her father to invite the Moors into Spain, enters largely into the cycle of Castilian romance, and into the grave narratives of every historian. It cannot, however, be traced in extant writings higher than the eleventh century, when it appears in the Chronicle of the Monk of Silos. There are Spanish historians of the eighth and ninth centuries; in the former Isidore, bishop of Beja (Pacensis), who wrote a chronicle of Spain; in the latter, Paulus Diaconus of Merida, Sebastian of Salamanca, and an anonymous chronicler. It does not appear, however, that these dwell much on Roderic's reign. (See Masdeu, Historia Critica de España, vol. xiii. p. 182.) The most critical investigators of history, therefore, have treated the story as too apocryphal to be stated as a fact. A sensible writer in the History of Spain and Portugal, published by the Society for the Diffusion of Useful Knowledge, has defended its probability, quoting a passage from Ferreras, a Spanish writer of the eighteenth century, whose authority stands high, and who argues in favour of the tradition from the brevity of the old chroniclers who relate the fall of Spain, and from the want of likelihood that Julian, who had hitherto defended his country with great valour, would have invited the Saracens, except through some strong motives. This, if we are satisfied as to the last fact, appears plausible; but another hypothesis has been sug-

gested, and is even mentioned by one of the early writers, that Julian, being of Roman descent, was ill-affected to the Gothic dynasty, who had never attached to themselves the native inhabitants. This I cannot but reckon the less likely explanation of the two. Roderic, who became archbishop of Toledo in 1208, and our earliest authority after the monk of Silos, calls Julian, "vir nobilis de nobili Gothorum prosapia ortus, illustris in officio Palatino, in armis exercitatus," &c. (See Schottus, Hispania Illustrata, ii. 63.) Few, however, of those who deny the truth of the story, as it relates to Cava, admit the defection of Count Julian to the Moors, and his existence has been doubted. The two parts of the story cohere together, and we have no better evidence for one than for the other.

Southey, in his notes to the poem of Roderic, says, "The best Spanish historians and antiquaries are persuaded that there is no cause for disbelieving the uniform and concurrent tradition of both Moors and Christians." But this is on the usual assumption, that those are the best who agree best with ourselves. Southey took, generally, the credulous side, and his critical judgment is of no superlative value. Masdeu, in learning and laboriousness the first Spanish antiquary, calls the story of Julian's daughter "a ridiculous tale, framed in the age of romance, when histories were thrust aside (arrinconadas), and any lovetale was preferred to the most serious truth." (Hist. Crit. de España, vol. x. p. 223.) And when, in another passage (vol. xii. p. 6.), he recounts the story at large, he says that the silence of all writers before the monk of Silos "should be sufficient, in my opinion, to expel from our history a romance so destitute of foundation, which the Arabian romancers doubtless invented for their ballads."

A modern writer of extensive learning says: "This fable which has found its way into most of the sober histories of Spain, was first introduced by the monk of Silos, a chronicler of the eleventh century. There can be no doubt that he borrowed it from the Arabs, but it seems hard to believe that it was altogether a tale of their invention. There are facts in it which an Arab could not have

invented, unless he drew them from Christian sources; and, as I shall show hereafter, the Arabs knew and consulted the writings of the Christians." (Gayangos, History of the Mohammedan Dynasties of Spain, vol. i. p. 513.). It does not appear to be a conclusion from this passage that the story is a fable. For if a chronicler of the eleventh century borrowed it from the Arabs, and they again from Christian sources, we get over a good deal of the chasm of time. But if writers antecedent to the monk of Silos have related the Arabian invasion and the fall of Roderic, without alluding to so important a point as the treachery of a great Gothic noble, it seems difficult to resist the inference from their silence.

Gayangos investigates in a learned note (vol. i. p. 537.) the following points:—By whom and when was the name of Ilyan, the Arabic form of Julian, first introduced into Spanish history? Did such a man ever exist? What were his country and religion? Was he an independent prince, or a tributary to the Gothic monarchs? What part did he take in the conquest of Spain by the Arabs?

The account of Julian, in the Chronicon Silense, appears to Gayangos indisputably borrowed from some Arabian authority; and this he proves by several writers from the ninth century downwards, "all of whom mention more or less explicitly, the existence of a man living in Africa, and named Ilyan, who helped the Arabs to make a conquest of Spain; to which I ought to add, that the rape of Ilyan's daughter and the circumstances attending it may also be read in detail in the Mahommedan authors who preceded the monk of Silos." The result of this learned writer's investigation is, that Ilyan really existed, that he was a Christian chief, settled, not in Spain, but on the African coast, and that he betrayed, not his country (except indeed as he was probably of Spanish descent), but the interests of his religion, by assisting the Saracens to subjugate the Gothic kingdom.*

* The Arabian writer whom Gayangos translates, one of late date, speaks of Ilyan as governor of Ceuta, but tells the story of Cava in the usual

The story of Cava is not absolutely overthrown by this hypothesis, though it certainly may be the invention of some Christian or Arabian romancer. It is perfectly true that of itself it contains no apparent improbability. Injuries have been thus inflicted by kings, and thus resented by subjects. But for this very reason it was likely to be invented; and the unwillingness with which many seem to surrender so romantic a tale, attests the probability of its obtaining currency in an uncritical period. We must reject it as false or not, according as we lay stress on the negative argument from the silence of very early writers (an argument, strong even as it is, and which would be insuperable if they were less brief and imperfect), and on the presumptions adduced by Gayangos, that Julian was not a noble Spaniard; but we cannot receive this celebrated legend at any rate with more than a very sceptical assent, not sufficient to warrant us in placing it among the authentic facts of history.

manner. The Goths may very probably have possessed some of the African coast; so that the residence of Julian on that side of the straits would not be incompatible with his being truly a Spaniard. Ilyan is evidently not an European form of the name.

CHAP. V.

GERMANY.

101.

SUZERAINTY OF GERMANY OVER FRANCE.

Edit. 1826, vol. ii. p. 91. Edit. 1841, vol. i. p. 428.

THIS acknowledgment of sovereignty in Arnulf king of Germany, who did not even pretend to be emperor, by both the claimants of the throne of France, for such it virtually was, though they do not appear to have rendered homage, cannot affect the independence of the crown in that age, which had been established by the treaty of Verdun in 843, but proves the weakness of the competitors, and their want of patriotism. In Eudes it is more remarkable than in Charles the Simple, a man of feeble character, and a Carlovingian by birth.

102.

PARTITION OF GREAT FIEFS.

Edit. 1826, vol. ii. p. 125. Edit. 1841, vol. i. p. 446.

NOTWITHSTANDING these subdivisions, and the most remarkable of those which I have mentioned are of a date rather subsequent to the middle ages, the antagonist principle of consolidation by various means of acquisition was so actively at work that several princely houses, especially those of Hohenzollern or Brandeburg, of Hesse, Wirtemburg, and the Palatinate, derive their importance from the same era, the fourteenth and fifteenth centuries, in which the prejudice against partition was the strongest. And thus it it will often be found in private patrimonies; the tendency to consolidation of property works more rapidly than that to its disintegration by a law of gavelkind.

103.

CHARACTER OF FREDERIC III.

Edit. 1826, vol. ii. p. 124. Edit. 1841, vol. i. p. 450.

RANKE has drawn the character of Frederic III. more favourably, on the whole, than preceding historians, and with a discrimination which enables us to account better for his success in the objects which he had at heart. "From his youth he had been inured to trouble and adversity. When compelled to yield, he never gave up a point, and always gained the mastery in the end. The maintenance of his prerogatives was the governing principle of all his actions, the more because they acquired an ideal value from their connection with the imperial dignity. It cost him a long and severe struggle to allow his son to be crowned king of the Romans; he wished to take the supreme authority undivided with him to the grave: in no case would he grant Maximilian any independent share in the administration of government; but kept him, even after he was king, still as "son of the house;" nor would he ever give him any thing but the countship of Cilli; "for the rest he would have time enough." His frugality bordered on avarice, his slowness on inertness, his stubbornness on the most determined selfishness; yet all these faults are removed from vulgarity by high qualities. He had at bottom a sober depth of judgment, a sedate and inflexible honour; the aged prince, even when a fugitive imploring succour, had a personal bearing which never allowed the majesty of the empire to sink." (Hist. Reformation (Translation), vol. i. p. 103.)

A character of such obstinate passive resistance was well fitted for his station in that age; spite of his poverty and weakness, he was hereditary sovereign of extensive and fertile territories; he was not loved, feared, or respected, but he was necessary; he was a German, and therefore not to be exchanged for a king of Hungary or

Bohemia; he was, not as Frederic of Austria, but as elected emperor, the sole hope for a more settled rule, for public peace, for the maintenance of a confederacy so ill held together by any other tie. Hence he succeeded in what seemed so difficult—in procuring the election of Maximilian as king of the Romans; and interested the German diet in maintaining the Burgundian inheritance, the western provinces of the Netherlands, which the latter's marriage brought into the house of Austria.

CHAP. VI.

GREEKS AND SARACENS.

104.

GENUINENESS OF THE KORAN.

Edit. 1826, vol. ii. p. 163. note *. Edit. 1841, vol. i. p. 475. note *.

I APPREHEND that there are no doubts worth naming with respect to the genuineness of the Koran, as the work of Mohammed himself.

CHAP. VII.

ECCLESIASTICAL POWER.

THIS Chapter, though written more rapidly than any other of equal length, has been considered by some the best in the present Work. I have not seen cause for much alteration; but perhaps the tone taken towards the mediæval Church is in some places too severe, or at least too one-sided. The same remark might be made as to the ninth Chapter. It is exceedingly difficult to hold the scales, on this subject, with impartiality, and yet without that indifference to moral right, which the habit of perpetual indulgence to past ages sometimes has a tendency to generate. Guizot is a model of justice and candour; but I was trained in the Protestant school of ecclesiastical history, and in that of the eighteenth century, which now and then failed in these points.

105.

ANGLO-SAXON CHURCH.

Edit. 1826, vol. ii. p. 204. Edit. 1841, vol. i. p. 502.

PALGRAVE has shown that the Anglo-Saxon clergy were not exempt from the *trinoda necessitas* imposed on all allodial proprietors. They were better treated on the Continent; and Boniface exclaims, that in no part of the world was such servitude imposed on the Church as among the English. (English Commonwealth, i. 158.) But when we look at the charters collected in Kemble's Codex Diplomaticus (most or nearly all of them in favour of the Church), we shall hardly think they were ill off, though they might be forced sometimes to repair a bridge or send their tenants against the Danes.

106.

PAROCHIAL MINISTERS.

Edit. 1826, vol. ii. p. 205. Edit. 1841, vol. i. p. 503.

THESE were not always itinerant; commonly, perhaps, they were dependants of the lord, appointed by the bishop on his nomination. — Lehuerou, Institut. Carolingiennes, p. 526. who quotes a capitulary of the emperor Lothaire in 825. "De clericis vero laicorum, unde nonnulli eorum conqueri videantur, eo quod quidam episcopi ad eorum preces nolint in ecclesiis suis eos, cum utiles sint, ordinare, visum nobis fuit, ut . . . . et cum caritate et ratione utiles et idonei eligantur; et si laicus idoneum utilemque clericum obtulerit, nulla qualibet occasione ab episcopo sine ratione certa repellatur; et si rejiciendus est, propter scandalum vitandum evidenti ratione manifestetur." Another capitulary of Charles the Bald, in 864, forbids the establishment of priests in the churches of patrons, or their ejection without the bishop's consent: — "De his qui sine consensu episcopi presbyteros in ecclesiis *suis* constituunt, vel de ecclesiis dejiciunt." Thus the churches are recognised as the property of the lord; and the parish may be considered as an established division, at least very commonly, so early as the Carlovingian empire. I do not by any means deny that it was partially known in France before that time.

Guizot reckons the patronage of churches by the laity among the circumstances which diminished or retarded ecclesiastical power. (Leçon 13.) It may have been so; but without this patronage there would have been very few parish churches. It separated, in some degree, the interests of the secular clergy from those of the bishops and the regulars.

107.

GRANT OF ETHELWOLF.

Edit. 1826, vol. ii. p. 207. Edit. 1841, vol. i. p. 505.

THIS grant is recorded in two charters differing materially from each other; the first transcribed in Ingulfus's

history of Croyland, and dated at Winchester on the Nones of November, 855; the second extant in two chartularies, and bearing date at Wilton, April 22. 854. This is marked by Mr. Kemble as spurious (Codex Ang.-Sax. Diplom. ii. 52.); and the authority of Ingulfus is not sufficient to support the first. The fact, however, that Ethelwolf made some great and general donation to the Church rests on the authority of Asser, whom later writers have principally copied. His words are:—"Eodem quoque anno [855] Adelwolfus venerabilis, rex Occidentalium Saxonum, decimam totius regni sui partem ab omni regali servitio et tributo liberavit, et in sempiterno grafio in cruce Christi, pro redemptione animæ suæ et antecessorum suorum, Uni et Trino Deo immolavit. (Gale, XV Script. iii. 156.)

It is really difficult to infer any thing from such a passage; but whatever the writer may have meant, or whatever truth there may be in his story, it seems impossible to construe his words of a grant of tithes. The charter in Ingulfus rather leads to suppose, but that in the Codex Diplomaticus decisively proves, that the grant conveyed a tenth part of the land, and not of its produce. Sir F. Palgrave, by quoting only the latter charter, renders Selden's hypothesis, that the general right to tithes dates from this concession of Ethelwolf, more untenable than it is. Certainly the charter copied by Ingulfus, which Sir F. Palgrave passes in silence, does grant "decimam partem bonorum;" that is, I presume, of chattels, which, as far as it goes, implies a tithe; while the words applicable to land are so obscure and apparently corrupt, that Selden might be warranted in giving them the like construction. Both charters probably are spurious; but there may have been an extensive grant to the Church, not only of immunity from the *trinoda necessitas*, which they express, but of actual possessions. Since, however, it must have been impracticable to endow the Church with a tenth part of appropriated lands, it might possibly be conjectured, that she took a tenth part of the produce, either as a composition, or until means should be found

of putting her in possession of the soil. And although, according to the notions of those times, the actual property might be more desirable, it is plain to us that a tithe of the produce was of much greater value than the same proportion of the land itself.

108.

SPOLIATION OF THE CHURCH.

Edit. 1826, vol. ii. p. 209. Edit. 1841, vol. i. p. 505.

THE church was often compelled to grant leases of her lands, under the name of *precariæ*, to laymen, who probably rendered little or no service in return, though a rent or *census* was expressed in the instrument. These *precariæ* seem to have been for life, but were frequently renewed. They are not to be confounded with *terræ censuales*, or lands let to a tenant at rack-rent, which of course formed a considerable branch of revenue. The grant was called *precaria* from being obtained at the prayer of the grantee; and the uncertainty of its renewal seems to have given rise to the adjective *precarious*.

In the ninth century, though the pretensions of the bishops were never higher, the Church itself was more pillaged under pretext of these *precariæ*, and in other ways, than at any former time. — See Ducange for a long article on Precariæ.

109.

WEALTH OF ENGLISH CLERGY.

Edit. 1826, vol. ii. p. 209. note §. Edit. 1841, vol. i. p. 506.

ANTHONY HARMER (Henry Wharton), says that the monasteries did not possess one fifth of the land; and I incline to think that he is nearer the truth than Mr. Turner, who puts the wealth of the church at above 28,000 knights' fees, out of 53,215. The bishops' lands could not by any means account for the difference; so that Mr. Turner was probably deceived by his authority.

110.

CAPITULARY OF CHARLEMAGNE.

Edit. 1826, vol. ii. p. 211. Edit. 1841, vol. i. p. 508.

THIS capitulary is erroneously ascribed to Charlemagne. It is only found in one of the three books subjoined by Benedict Levita to the four books of capitularies collected by Ansegisus; the latter relating only to Charlemagne and Louis, but the former comprehending many of later emperors and kings. And, what is of more importance, it seems exceedingly doubtful whether this is any genuine capitulary at all. It is not referred to any prince by name, nor is it found in any other collection. I was misled by a passage in the Mémoires de l'Acad. des Inscript. vol. xxxix. (erroneously printed xxxvii.), where M. Pouilly says — "Charlemagne voulut qu'elle fût suivie dans toute l'étendue des pays soumis à sa domination." Though I looked at the reference to Baluze, which I have given, my attention was not turned to the weakness of the proof. Fleury and Schmidt, in the passages referred to in my note, have fallen into the same error.

111.

ECCLESIASTICAL POLICY OF CHARLEMAGNE.

Edit. 1826, vol. ii. p. 219. Edit. 1841, vol. i. p. 513.

CHARLEMAGNE had apparently devised an ecclesiastical theory, which would now be called Erastian, and, perhaps, not very short of that of Henry VIII. He directs the clergy what to preach in his own name, and uses the first person in ecclesiastical canons. Yet, if we may judge by the events, the bishops lost no part of their permanent ascendancy in the state through this interference, though compelled to acknowledge the supremacy of a great mind. By a vigorous repression of those secular propensities which were displaying themselves among the superior

clergy, he endeavoured to render their moral influence more effective. This, however, could not be achieved in the ninth century; nor could it have been brought about by any external power. Nor was it easily consistent with the continual presence of the bishops in national assemblies, which had become essential to the polity of his age, and with which he would not, for several reasons, have wholly dispensed. Yet it appears, by a remarkable capitulary of 811, that he had perceived the inconvenience of allowing the secular and spiritual powers to clash with each other:—"Discutiendum est atque interveniendum in quantum se episcopus aut abbas rebus secularibus debeat inserere, vel in quantum comes, vel alter laicus, in ecclesiastica negotia." But as the laity, himself excepted, had probably interfered very little in church affairs, this capitulary seems to be restrictive of the prelates.

112.

DEPOSITION OF LOUIS.

Edit. 1826, vol. ii. p. 220. Edit. 1841, vol. i. p. 514.

A LATE writer has taken a different view of this event, the deposition of Louis at Compeigne. It was not, he thinks, "une hardiesse sacerdotale, une temerité ecclesiastique, mais bien une lâcheté politique. Ce n'était point une tentative pour élever l'autorité réligieuse au-dessus de l'autorité royale dans les affaires temporelles; c'était, au contraire, un abaissement servile de la première devant le monde." (Fauriel, Hist. de la Gaule Méridionale, iv. 150.) In other words, the bishops lent themselves to the aristocratic faction which was in rebellion against Louis. Ranke, as has been seen in an early note, thinks that they acted out of revenge for his deviation from the law of 817, which established the unity of the empire. The bishops, in fact, had so many secular and personal interests and sympathies, that we cannot always judge of their behaviour upon general principles.

113.

EDWY AND ELGIVA.

Edit. 1826, vol. ii. p. 224. note *. Edit. 1841, vol. i. p. 516.

THIS note is not as carefully written as it might have been. The subject has been since discussed by Dr. Lingard in his histories both of England and of the Anglo-Saxon Church, by the Edinburgh reviewer of that history, vol. xlii. (Mr. Allen), and by other late writers. It must ever be impossible, unless unknown documents are brought to light, to clear up all the facts of this litigated story. But though some Protestant writers, as I have said, in maintaining the matrimonial connexion of Edwy and Elgiva, quote authorities who give a different colour to it, there is a presumption of the marriage from a passage of the Saxon Chronicle, A. D. 958 (wanting in Gibson's edition, but discovered by Mr. Turner, and now restored to its place by Mr. Petrie), which distinctly says that Archbishop Odo separated Edwy the king and Elgiva, because they were too nearly related. It is therefore highly probable that she was queen, though Dr. Lingard seems to hesitate. This passage was written as early as any other which we have on the subject, and in a more placid and truthful tone.

The royalty, however, of Elgiva will be out of all possible doubt, if we can depend on a document, being a reference to a charter, in the Cotton library (Claudius, B. vi.), wherein she appears as a witness. Turner says of this:—"Had the charter even been forged, the monks would have taken care that the names appended were correct." This Dr. Lingard inexcusably calls "confessing that the instrument is of very doubtful authenticity."

The Edinburgh reviewer, who had seen the manuscript, believes it genuine, and gives an account of it. Mr. Kemble has printed it without mark of spuriousness. (Cod. Diplom. vol. v. p. 378.) In this document we have the names of Ælfgifu the king's wife, and of Æthelgifu the king's wife's mother. The signatures are only

recited, so that the document itself cannot be properly styled a charter; but we are only concerned with the testimony it bears to the existence of the queen Elgiva and her mother.

If this charter, thus recited, is established, we advance a step, so as to prove the existence of a mother and daughter, bearing nearly the same names, and such names as apparently imply royal blood, the latter being married to Edwy. This would tend to corroborate the coronation story, divesting it of the gross exaggerations of the monkish biographers and their followers. It might be supposed that the young king, little more than a boy, retired from the drunken revelry of his courtiers, to converse and perhaps romp with his cousin and her mother; that Dunstan audaciously broke in upon him, and forced him back to the banquet; that both he and the ladies resented this insolence as it deserved, and drove the monk into exile, and that the marriage took place.

It is more difficult to deal with the story, originally related by the biographer of Odo, that after his marriage Edwy carried off a woman with whom he lived, and whom Odo seized and sent out of the kingdom. This lady is called by Eadmer, una de præscriptis mulieribus; whence Dr. Lingard assumes her to have been Ethelgiva, the queen's mother. This was in his History of England (i. 517.); but in the second edition of the Antiquities of the Anglo-Saxon Church he is far less confident than either in the first edition of that work, or in his history. In fact, he plainly confesses, that nothing can be clearly made out beyond the circumstances of the coronation and the subsequent marriage.

Although the writers before the conquest do not bear witness to the cruelties exercised on some woman connected with the king, either as queen or mistress, at Gloucester, yet the subsequent authorities of Eadmer, Osbern, and Malmsbury may lead us to believe that there was truth in the main facts, though we cannot be certain that the person so treated was the queen Elgiva. If indeed their accounts are accurate, it seems at first that they do not agree with their predecessors; for they repre-

sent the lady as being in the king's company up to his flight from the insurgents: — "Regem cum adultera fugitantem persequi non desistunt." But though we read in the Saxon Chronicle that Odo divorced Edwy and Elgiva, we are not sure that they submitted to the sentence. It is, therefore, possible, that she was with him in this disastrous flight, and having fallen into the hands of the pursuers, was put to death at Gloucester. True it is, that her proximity of blood to the king would not warrant Osbern to call her *adultera;* but bad names cost nothing. Malmsbury's words look more like it, if we might supply something, "proximè cognatam invadens uxorem [cujusdam?] ejus formà deperibat;" but as they stand in his text, they defy my scanty knowledge of the Latin tongue. On the whole, however, no reliance is to be placed on very passionate and late authorities. What is manifest alone is, that a young king was persecuted and dethroned by the insolence of monkery exciting a superstitious people against him.

114.

EARLY PAPAL AUTHORITY.

Edit. 1826, vol. ii. p. 225. Edit. 1841, vol. i. p. 516.

I AM induced, by further study, to modify what is said in the text with respect to the well known passages in Irenæus and Cyprian. The former assigns, indeed, a considerable weight to the *Church* of Rome, simply as testimony to apostolical teaching; but this is plainly not limited to the bishop of that city, nor is he personally mentioned. It is therefore an argument, and no slight one, against the pretended supremacy rather than the contrary.

The authority of Cyprian is not, perhaps, much more to the purpose. For the only words in his treatise De Unitate Ecclesiæ, which assert any authority in the chair of St. Peter, or indeed connect Rome with Peter at all, are interpolations, not found in the best manuscripts, or

in the oldest editions. They are printed within brackets in the best modern ones. (See James on Corruptions of Scripture in the Church of Rome, 1612.) True it is, however, that in his Epistle to Cornelius, bishop of Rome, Cyprian speaks of "Petri cathedram, atque ecclesiam principalem unde unitas sacerdotalis exorta est. (Epist. lix. in edit. Lip. 1838; lv. in Baluze and others.) And in another he exhorts Stephen, successor of Cornelius, to write a letter to the bishops of Gaul, that they should depose Marcian of Arles for adhering to the Novatian heresy. (Epist. lxviii., or lxvii.) This is said to be found in very few manuscripts. Yet it seems too long, and not sufficiently to the purpose, for a popish forgery. All bishops of the Catholic Church assumed a right of interference with each other by admonition; and it is not entirely clear from the language, that Cyprian meant any thing more authoritative; though I incline, on the whole, to believe that, when on good terms with the see of Rome, he recognised in her a kind of primacy derived from that of St. Peter.

The case, nevertheless, became very different when she was no longer of his mind. In a nice question which arose, during the pontificate of this very Stephen, as to the rebaptism of those to whom the rite had been administered by heretics, the bishop of Rome took the negative side; while Cyprian, with the utmost vehemence, maintained the contrary. Then we find no more honeyed phrases about the principal Church and the succession to Peter, but a very different style:—"Cur in tantum Stephani, fratris nostri, obstinatio dura prorupit?" (Epist. lxxiv.) And a correspondent of Cyprian, doubtless a bishop, Firmilianus by name, uses more violent language:—"Audacia et insolentia ejus — aperta et manifesta Stephani stultitia — de episcopatûs sui loco gloriatur, et se successionem Petri tenere contendit." (Epist. lxxv.) Cyprian proceeded to summon a council of the African bishops, who met, seventy-eight in number, at Carthage. They all agreed to condemn heretical baptism as absolutely invalid. Cyprian addressed them, requesting that they would use full liberty, not without a manifest reflection on the pretensions of Rome:

— "Neque enim quisquam nostrûm episcopum se esse episcoporum constituit, aut tyrannico terrore ad obsequendi necessitatem collegas suos adigit, quando habeat omnis episcopus pro licentia libertatis et potestatis suæ arbitrium proprium, tamque judicari ab alio non possit, quam nec ipse potest alterum judicare." We have here an allusion to what Tertullian had called *horrenda vox*, "episcopus episcoporum;" manifestly intimating that the see of Rome had begun to assert a superiority and right of control, by the beginning of the third century, but at the same time that it was not generally endured. Probably the notion of their superior authority, as witnesses of the faith, grew up in the Church of Rome very early; and when Victor, towards the end of the second century, excommunicated the churches of Asia for a difference as to the time of keeping Easter, we see the germination of that usurpation, that tyranny, that uncharitableness, which reached its culminating point in the centre of the mediæval period.

115.

CONCESSION OF PHOCAS.

Edit. 1826, vol. ii. p. 231. note †. Edit. 1841, vol. i. p. 520. note †.

THE earliest mention of this transaction that I have found, and one which puts an end to the pretended concession of such a title as Universal Bishop, is in a brief general chronology, by Bede, entitled "De Temporum Ratione." He only says of Phocas:—"Hic, rogante papa Bonifacio, statuit sedem Romanæ et apostolicæ ecclesiæ caput esse omnium ecclesiarum, quia ecclesia Constantinopolitana primam se omnium ecclesiarum scribebat." (Bedæ Opera, curâ Giles, vol. vi. p. 323.) This was probably the exact truth; and the subsequent additions were made by some zealous partisans of Rome, to be seized hold of in a later age, and turned against her by some of her equally zealous enemies. The distinction generally made is, that the pope is "universalis ecclesiæ episcopus," but nôt "episcopus universalis; that is, he has no immediate juris-

diction in the dioceses of other bishops, though he can correct them for the undue exercise of their own. The Ultra-montanes of course go farther.

116.

WILFRID.

Edit. 1826, vol. ii. p. 232. note *. Edit. 1841, vol. i. p. 521. note †.

THE history of Wilfrid has been lately put in a light as favourable as possible to himself and to the authority of Rome, by Dr. Lingard. We have for this to rely on Eddius (published in Gale's Scriptores), a panegyrist in the usual style of legendary biography,—a style which has, on me at least, the effect of producing utter distrust. Mendacity is the badge of all the tribe. Bede is more respectable; but in this case we do not learn much from him. It seems impossible to deny that, if Eddius is a trustworthy historian, Dr. Lingard has made out his case; and that we must own appeals to Rome to have been recognised in the Anglo-Saxon Church. Nor do I perceive any improbability in this, considering that the Church had been founded by Augustin, and restored by Theodore, both under the authority of the Roman see. This intrinsic presumption is worth more than the testimony of Eddius. But we see by the rest of Wilfrid's history, that it was not easy to put the sentence of Rome in execution. The plain facts are, that having gone to Rome claiming the see of York, and having had his claim recognised by the pope, he ended his days as bishop of Hexham.

117.

EXEMPTION OF MONASTERIES.

Edit. 1826, vol. ii. p. 238. Edit. 1841, vol. i. p. 526.

THE bishops had exercised an arbitrary, and sometimes a tyrannical power over the secular clergy; and after the

monks became part of the Church, which was before the close of the sixth century, they also fell under a control not always fairly exerted. Both complained greatly, as the acts of councils bear witness: — "Un fait important et trop peu remarqué se révéle çà et là dans le cours de cette époque ; c'est la lutte des prêtres de paroisse contre les évêques." (Guizot, Hist. de la Civilis. en France, Leçon 13.) In this contention the weaker must have given way; but the regulars, sustained by public respect, and having the countenance of the see of Rome, which began to encroach upon episcopal authority, came out successful in securing themselves by exemptions from the jurisdiction of the bishops. The latter furnished a good pretext by their own relaxation of manners. The monasteries, in the eighth and ninth centuries, seem not to have given occasion to much reproach, at least in comparison with the prelacy. "Au commencement du huitième siècle, l'église était elle tombée dans un désordre presque égal à celui de la société civile. Sans supérieurs et sans inférieurs à redouter, dégagés de la surveillance des métropolitains comme des conciles et de l'influence des prêtres, une foule d'évêques se livraient aux plus scandaleux excès."

118.

MARRIAGE OF CLERGY IN EARLY CHURCH.

Edit. 1826, vol. ii. p. 250. note *. Edit. 1841, vol. i. p. 533.

LINGARD says of the Anglo-Saxon Church: — "During more than 200 years from the death of Augustin, the laws respecting clerical celibacy, so galling to the natural propensities of man, but so calculated to enforce an elevated idea of the sanctity which becomes the priesthood, were enforced with the utmost rigour; but during part of the ninth century and most of the tenth, when the repeated and sanguinary devastations of the Danes threatened the destruction of the hierarchy no less than of the government, the ancient canons opposed but a feeble barrier to the impulse of the passions." (Ang.-Sax.

Church, p. 176.) Whatever may have been the case in England, those who look at the abstract of the canons of French and Spanish councils, in Dupin's Ecclesiastical History, from the sixth to the eleventh century, will find hardly one wherein there is not some enactment against bishops or priests retaining wives in their houses. Such provisions were not repeated certainly without reason; so that the remark of Fleury, that he has found no instance of clerical marriage before 893, cannot weigh for a great deal. It is probable that bishops did not often marry after their consecration; but this cannot be presumed of priests. Southey, in his "Vindiciæ Ecclesiæ Anglicanæ," p. 290., while he produces some instances of clerical matrimony, endeavours to mislead the reader into the supposition that it was ever conformable to ecclesiastical canons.*

119.

EFFORTS TO MAINTAIN CLERICAL MATRIMONY.

Edit. 1826, vol. ii. p. 252. Edit. 1841, vol. i. p. 534.

THE English clergy long set at nought the fulminations of the pope against their domestic happiness; and the common law, or at least irresistible custom, seems to have been their shield. There is some reason to believe that their children were legitimate for the purposes of inheritance, which, however, I do not assert. The sons of priests are mentioned in several instruments of the twelfth and thirteenth centuries; but we cannot always be sure

* A late writer, who has glosed over every fact in ecclesiastical history which could make against his own particular tenets, asserts:—"In the earliest ages of the Church no restriction whatever had been placed on the clergy in this respect." (Palmer's Compendious Ecclesiastical History, p. 115.) This may be, and I believe it is, very true of the Apostolical period; but the "earliest *ages*" are generally understood to go farther; and certainly the prohibition of marriage to priests was an established custom of some antiquity at the time of the Nicene Council. The question agitated there was, not whether priests should marry, contrary, as it was admitted by their advocate, to ἀρχαια ἐκκλησίας παράδοσις, but whether married men should be ordained. I do not see any difference in principle; but the Church had made one.

that they were not born before their father's ordination, or that they were reckoned legitimate.*

An instance however occurs in the Rot. Cur. Regis, A.D. 1194, where the assize find that there has been no presentation to the church of Dunston, but the parsons have held it from father to son. Sir Francis Palgrave, in his Introduction to these records (p. 29.), gives other proofs of this hereditary succession in benefices. Giraldus Cambrensis, about the end of Henry II.'s reign (*apud* Wright's Political Songs of England, p. 353.), mentions the marriage of the parochial clergy as almost universal. "More sacerdotum parochialium Angliæ fere cunctorum damnabili quidem et detestabili, publicam secum habebat comitem individuam, et in foco focariam, et in cubiculo concubinam." They were called *focariæ*, as living at the same hearth; and this might be tolerated, perhaps, on pretence of service; but the fellowship, we perceive, was not confined to the fireside. It was about this time that a poem, De Concubinis Sacerdotum, commonly attributed to Walter Mapes, but alluding by name to Pope Innocent III., humorously defends the uncanonical usage. It begins thus: —

> "Prisciani regula penitus cassatur,
> Sacerdos per *hic* et *hæc* olim declinabatur,
> Sed per *hic* solummodo nunc articulatur,
> Cum per nostrum præsulem *hæc* amoveatur."

The last lines are better known, having been often quoted: —

> "Ecce jam pro clericis multum allegavi,
> Necnon pro presbyteris multa comprobavi;
> Pater-noster nunc pro me, quoniam peccavi,
> Dicat quisque presbyter cum suâ suavi."
> *Poems ascribed to Mapes*, p. 171. (Camden Society, 1841.)

* Among the witnesses to some instruments in the reign of Edward I., printed by Mr. Hudson Gurney from the court-rolls of the manor of Keswick in Norfolk, we have more than once Walter filius presbyteri. But the rest are described by the father's surname, except one, who is called filius Beatricis; and as he may be suspected of being illegitimate, we cannot infer the contrary as to the priest's son.

Several other poems in this very curious volume allude to the same subject. In a dialogue between a priest and a scholar, the latter having taxed him with keeping a *presbytera* in his house, the parson defends himself by recrimination :—

> "Malo cum presbytera pulcra fornicari,
> Servituros domino filios lucrari,
> Quam vagas satellites per antra sectari;
> Est inhonestissimum sic dehonestari." (p. 256.)

It is said by Raumer (Gesch. der Hohenstauffen, vi. 235.), that there was a married bishop of Prague during the pontificate of Innocent III., and that the custom of clerical marriages lasted in Hungary and Sweden to the end of the thirteenth century.

120.

CONCORDAT OF WORMS.

Edit. 1826, vol. ii. p. 268. Edit. 1841, vol. i. p. 544.

RANKE observes, that according to the Concordat of Worms predominant influence was yielded to the emperor in Germany, and to the pope in Italy; an agreement, however, which was not expressed with precision, and which contained the germ of fresh disputes. (Hist. of Refor. i. 34.) But even if this victory should be assigned to Rome in respect of Germany, it does not seem equally clear as to England. Lingard says of the agreement between Henry I. and Paschal II.:—"Upon the whole, the Church gained little by this compromise. It might check but did not abolish the principal abuse. If Henry surrendered an unnecessary ceremony, he still retained the substance. The right which he assumed of nominating bishops and abbots was left unimpaired." (Hist. of Eng. ii. 169.) But if this nomination by the crown was so great an abuse, why did the popes concede it to Spain and France? The real truth is, that no mode of choosing bishops is alto-

gether unexceptionable. But, upon the whole, nomination by the crown is likely to work better than any other, even for the religious good of the Church. As a means of preserving the connexion of the clergy with the state, it is almost indispensable.

Schmidt observes, as to Germany, that the dispute about investitures was not wholly to the advantage of the Church; though she seemed to come out successfully, yet it produced a hatred on the part of the laity, and above all, a determination in the princes and nobility to grant no more lands over which their suzerainty was to be disputed. (iii. 269.) The emperors retained a good deal—the regale, or possession of the temporalities during a vacancy; the prerogative, on a disputed election, of investing whichever candidate they pleased; above all, perhaps, the recognition of a great principle, that the Church was, as to its temporal estate, the subject of the civil magistrate. The feudal element of society was so opposite to the ecclesiastical, that whatever was gained by the former was so much subtracted from the efficacy of the latter. This left an importance to the imperial investiture after the Calixtin Concordat, which was not intended probably by the pope. For the words, as quoted by Schmidt (iii. 301.)—Habeat imperatoria dignitas electum liberè, consecratum canonicè, regaliter per sceptrum sine pretio tamen investire solenniter — imply nothing more than a formality. The emperor is, as it were, commanded to invest the bishop after consecration. But in practice the emperors always conferred the investiture before consecration. (Schmidt, iv. 153.)

121.

DECRETUM OF GRATIAN.

Edit. 1826, vol. ii. p. 286. Edit. 1841, vol. ii. p. 2.

TIRABOSCHI has fixed on 1140, as the date of its appearance (iii. 343.); but others bring it down some years later.

122.

PRAGMATIC SANCTION OF LOUIS IX.

Edit. 1826, vol. ii. p. 302. Edit. 1841, vol. ii. p. 13.

THE pragmatic sanction has probably been called in question on insufficient grounds. It was published in 1268. Of this law Sismondi has said :—En lisant la pragmatique sanction, on se demande avec étonnement ce qui a pu causer sa prodigieuse célébrité. Elle n' introduit aucun droit nouveau; elle ne change rien à l'organisation ecclésiastique; elle declare seulement que tous les droits existans seront conservés, que toute la legislation canonique soit exécutée. A l'exception de l'article v, sur la levées d'argent de la cour de Rome, elle ne contient rien que cette cour n'eut pu publier elle-même; et quant à cet article, qui paroit seul dirigé contre la chambre apostolique, il n'est pas plus précis que ceux que bien d'autres rois de France, d'Angleterre et d'Allemagne, avaient dejà promulguées à plusieurs rêprises et toujours sans effet. (Vol. v. p. 106.) But Sismondi overlooks the fourth article, which enacts that all collations of benefices shall be made according to the maxims of councils and fathers of the Church. This was designed to repress the dispensations of the pope; and if the French lawyers had been powerful enough, it would have been successful in that object. He goes on, indeed, himself to say :—Ce qui changea la pragmatique sanction en une barrière puissante contre les usurpations de la cour de Rome, c'est que les légistes s'en emparérent; ils prirent soin de l'expliquer, de la commenter; plus elle était vague, et plus, entre leurs mains habiles, elle pouvoit recevoir d'extension. Elle suffisait seule pour garantir toutes les libertés du royaume; une fois que les parlemens étoient résolus de ne jamais permettre qu'elle fût violée, tout empiétement de la cour de Rome ou des tribunaux ecclésiastiques, toute levée de deniers ordonée par elle, toute élection irrégulière, toute excommunication, tout interdit, qui touchoient l' autorité royale ou les droits du sujet, furent dénoncés par les

légistes en parlement, comme contraires aux franchises des églises de France, et a la pragmatique sanction. Ainsi s'introduisait l'appel comme d' abus, qui réussit seul à contenir la jurisdiction ecclésiastique dans de justes bornes.

123.

ECCLESIASTICAL IMMUNITY.

Edit. 1826, vol. ii. p. 312. Edit. 1841, vol. ii p. 20.

THE privilege of exemption from criminal justice was not enjoyed by clerks in England before the Conquest; nor do we find it proved by any records long afterwards; though it seems, by what we read about the Constitutions of Clarendon, to have grown into use before the reign of Henry II. My expressions therefore in the text are too feeble. As to France and Germany, I cannot pretend to say that the law of Charlemagne enacting that exemption was ever abrogated.

124.

BENEFIT OF CLERGY.

Edit. 1826, vol. ii. p. 318. Edit. 1841, vol. ii. p. 23.

THIS is not likely to mislead a well-informed reader; but it ought, perhaps, to be mentioned, that by the "clerical privilege" we are only to understand what is called benefit of clergy; which in fact is, or rather was, till recent alterations of the law since the first edition of this Work, no more than the remission of capital punishment for the first conviction of felony; and that not for the clergy alone, but for all culprits alike. They were not called upon at any time, I believe, to prove their claim as clergy, except by reading the *neck-verse*, after trial and conviction in the king's court. They were then in strictness to be committed to the ordinary or ecclesiastical superior, which probably was not often done.

125.

GALLICAN CHURCH.

Edit. 1826, vol. ii. p. 348. Edit. 1841, vol. ii. p. 43.

THIS was written in 1816. The present state of opinion among those who sincerely belong to the Gallican Church, seems to have become exceedingly different from what it was in the last two centuries. [1847.]

126.

CONCLUSION OF THE CHAPTER.

Edit. 1826, vol. ii. p. 373. Edit. 1841, vol. ii. p. *55*.

THIS was also written in 1816; and would not have been similarly expressed in 1847.

CHAP. VIII.

CONSTITUTIONAL HISTORY OF ENGLAND.

127.

BRETWALDAS.

Edit. 1826, vol. ii. p. 376. Edit. 1841, vol. ii. p. 61.

THESE seven princes enumerated by Bede have been called Bretwaldas, and they have, by late historians, been advanced to higher importance, and to a different kind of power than, as it appears to me, there is any sufficient ground to bestow on them. But as I have gone more fully into this subject, in a paper about to be published in the 32nd volume of the "Archæologia," I shall content myself with giving the most material parts of what will there be found.

Bede is the original witness for the seven monarchs, who before his time had enjoyed a preponderance over the Anglo-Saxons, south of the Humber:— "Qui cunctis australibus gentis Anglorum provinciis, quæ Humbræ fluvio et contiguis ei terminis sequestrantur a Borealibus, imperârunt." (Hist. Eccl. lib. ii. c. 5.) The four first-named had no authority over Northumbria; but the last three being sovereigns of that kingdom, their sway would include the whole of England.

The Saxon Chronicle, under the reign of Egbert, says that he was the eighth who had a dominion over Britain; using the remarkable word, Bretwalda, which is found nowhere else. This, by its root *waldan*, a Saxon verb, to rule (whence our word *wield*), implies a ruler of Britain or the Britons. The Chronicle then copies the enumeration of the other seven in Bede, with a little abridgment. The kings mentioned by Bede are Ælli or Ella, founder of the

kingdom of the South-Saxons, about 477; Ceaulin, of Wessex, after the interval of nearly a century; Ethelbert, of Kent, the first Christian King; Redwald, of East Anglia; after him three Northumbrian kings in succession, Edwin, Oswald, Oswin. We have, therefore, sufficient testimony that, before the middle of the seventh century, four kings, from four Anglo-Saxon kingdoms, had, at intervals of time, become superior to the rest; excepting, however, the Northumbrians, whom Bede distinguishes, and whose subjection to a southern prince does not appear at all probable. None, therefore, of these could well have been called Bretwalda, or ruler of the Britons, while not even his own countrymen were wholly under his sway.

We now come to three Northumbrian kings, Edwin, Oswald, and Oswin, who ruled, in Bede's language, with greater power than the preceding, over all the inhabitants of Britain, both English and British, with the sole exception of the men of Kent. This he reports in another place with respect to Edwin, the first Northumbrian convert to Christianity; whose worldly power, he says, increased so much that, what no English sovereign had done before, he extended his dominion to the farthest bounds of Britain, whether inhabited by English or by Britons. (Hist. Eccl. lib. ii. c. 9.) Dr. Lingard has pointed out a remarkable confirmation of this testimony of Bede, in a life of St. Columba, published by the Bollandists. He names Cuminius, a contemporary writer, as the author of this life; but I find that these writers give several reasons for doubting whether it be his. The words are as follow:—"Oswaldum regem, in procinctu belli castra metatum, et in papilione supra pulvillum dormientem allocutus est, et ad bellum procedere jussit. Processit et secuta est victoria; reversusque postea totius Britanniæ imperator ordinatus a Deo, et tota incredula gens baptizata est." (Acta Sanctorum, Jun. 23.) This passage, on account of the uncertainty of the author's age, might not appear sufficient. But this anonymous life of Columba is chiefly taken from that by Adamnan, written about 700; and in that life we find the important expression about Oswald — "totius Britanniæ imperator

ordinatus a Deo." We have, therefore, here probably a distinct recognition of the Saxon word Bretwalda; for what else could answer to emperor of Britain? And, as far as I know, it is the only one that exists. It seems more likely that Adamnan refers to a distinct title bestowed on Oswald by his subjects, than that he means to assert as a fact, that he truly ruled over all Britain. This is not very credible, notwithstanding the language of Bede, who loves to amplify the power of favourite monarchs. For though it may be admitted that these Northumbrian kings enjoyed, at times, a preponderance over the other Anglo-Saxon principalities, we know that both Edwin and Oswald lost their lives in great defeats by Penda of Mercia. Nor were the Strathcluyd Britons in any permanent subjection. The name of Bretwalda, as applied to these three kings, though not so absurd as to make it incredible that they assumed it, asserts an untruth.

It is however, at all events plain from history, that they obtained their superiority by force; and we may probably believe the same of the four earlier kings enumerated by Bede. An elective dignity, such as is now sometimes supposed, cannot be presumed in the absence of every semblance of evidence, and against manifest probability. What appearance do we find of a federal union among the kites and crows, as Milton calls them, of the Heptarchy? What but the law of the strongest could have kept these rapacious and restless warriors from tearing the vitals of their common country? The influence of Christianity in effecting a comparative civilisation, and producing a sense of political as well as religious unity, had not yet been felt.

Mercia took the place of Northumberland as the leading kingdom of the Heptarchy, in the eighth century. Even before Bede brought his Ecclesiastical History to a close, in 731, Ethelbald of Mercia had become paramount over the southern kingdoms; certainly more so than any of the first four, who are called by the Saxon Chronicler Bretwaldas. "Et hæ omnes provinciæ cæteræque australes ad confinium usque Hymbræ fluminis cum suis

quæque regibus, Merciorum regi Ethelbaldo subjectæ sunt." (Hist. Ecc. v. 23.) In some charters of Ethelbald he styles himself, "non solum Marcensium sed et universarum provinciarum quæ communi vocabulo dicuntur Suthangli divina largiente gratia rex." (Codex Ang.-Sax. Diplom. i. 96. 100. 107.) Offa, his successor, retained great part of this ascendancy, and in his charters sometimes styles himself "rex Anglorum," sometimes "rex Merciorum simulque aliarum circumquaque nationum." (Ib. 162. 166, 167, *et alibi.*) It is impossible to define the subordination of the southern kingdoms, but we cannot reasonably imagine it to have been less than they paid in the sixth century to Ceaulin and Ethelbert. Yet to these potent sovereigns the Saxon Chronicle does not give the name bretwalda, nor a place in the list of British rulers. It copies Bede in this passage servilely, without regard to events which had occurred since the termination of his history.

I am, however, inclined to believe, combining the passage in Adamnan with this less explicitly worded of the Saxon Chronicle, that the three Northumbrian kings having been victorious in war and paramount over the minor kingdoms, were really designated, at least among their own subjects, by the name Bretwalda, or ruler of Britain, and totius Britanniæ imperator. The assumption of so pompous a title is characteristic of the vaunting tone which continued to increase down to the Conquest. We may therefore admit as probable, that Oswald of Northumbria in the seventh century, as well as his father Edwin and his son Oswin, took the appellation of Bretwalda to indicate the supremacy they had obtained, not only over Mercia and the other kingdoms of their countrymen, but, by dint of successful invasions, over the Strathcluyd Britons and the Scots beyond the Forth. I still entertain the greatest doubts, to say no more, whether this title was ever applied to any but these Northumbrian kings. It would have been manifestly ridiculous, too ridiculous, one would think, even for Anglo-Saxon grandiloquence, to confer it on the first four in Bede's list; and if it ex-

pressed an acknowledged supremacy over the whole nation, why was it never assumed in the eighth century?

We do not derive much additional information from later historians. Florence of Worcester, who usually copies the Saxon Chronicle, merely in this instance transcribes the text of Bede with more exactness than that had done: he neither repeats nor translates the word bretwalda. Henry of Huntingdon, after repeating the passage in Bede, adds Egbert to the seven kings therein mentioned, calling him "rex et monarcha totius Britanniæ," doubtless as a translation of the word Bretwalda in the Saxon Chronicle; subjoining the names of Alfred and Edgar as ninth and tenth in the list. Egbert, he says, was eighth of ten kings remarkable for their bravery and power (fortissimorum), who have reigned in England. It is strange that Edward the Elder, Athelstan, and Edred are passed over.

Rapin was the first who broached the theory of an elective bretwalda, possessing a sort of constitutional supremacy in the constitution of the Heptarchy; something like, as he says, the dignity of stadtholder of the Netherlands. It was taken up in later times by Turner, Lingard, Palgrave, and Lappenberg. But for this there is certainly no evidence whatever; nor do I perceive in it any thing but the very reverse of probability, especially in the earlier instances. With what we find read in Bede we may be content, confirmed as with respect to a Northumbrian sovereign it appears to be by the Life of Columba; and the plain history will be no more than this; that four princes from among the southern Anglo-Saxon kingdoms, at different times obtained, probably by force, a superiority over the rest; that afterwards three Northumbrian kings united a similar supremacy with the government of their own dominions; and that having been successful in reducing the Britons of the north and also the Scots into subjection, they assumed the title of Bretwalda, or ruler of Britain. This title was not taken by any later kings, though some in the eighth century were very powerful in England; nor did it at-

tract much attention, since we find the word only once employed by an historian, and never in a charter. The consequence I should draw is, that too great prominence has been given to the appellation, and undue inferences sometimes derived from it, by the eminent writers above mentioned.

128.

ANGLO-SAXON MONARCHY.

Edit. 1826, vol. ii. p. 378. Edit. 1841, vol. ii. p. 61.

THE assertion in the text, that Edward, Athelstan, and Edmund finally rendered the English monarchy co-extensive with the present limits of England, requires considerable modification. The reduction of all England under a single sovereign was accomplished by Edward the Elder, who may, therefore, be reckoned the founder of our monarchy more justly than Egbert. The five Danish towns, as they were called, Leicester, Lincoln, Stamford, Derby, and Nottingham, had been brought under the obedience of his gallant sister Æthelfleda, to whom Alfred had entrusted the vice-royalty of Mercia. Edward himself subdued the Danes of East Anglia and Northumberland. In 922 "the kings of the North Welsh sought him to be their lord." And in 924, "chose him for father and lord, the king of the Scots and the whole nation of the Scots, and Regnald, and the son of Eadulf, and all those who dwell in Northumberland, as well English as Danes and Northmen and others, and also the king of the Strathcluyd Britons, and all the Strathcluyd Britons." (Sax. Chronicle.)

Edward died next year; of his son Æthelstan it is said that "he ruled all the kings who were in this island; first, Howel, king of West Welsh, and Constantine king of the Scots, and Uwen king of the Gwentian (Silurian) people, and Ealdred son of Ealdalf of Bamborough, and they confirmed the peace by pledge and by oaths at the place

which is called Earnot, on the fourth of the Ides of July; and they renounced all idolatry, and after that submitted to him in peace." (Id. A. D. 926.)

From this time a striking change is remarkable in the style of our kings. Edward, of whom we have no extant charters after these great submissions of the native princes, calls himself only Angul-Saxonum rex. But in those of Athelstan, such as are reputed genuine (for the tone is still more pompous in some marked by Mr. Kemble with an asterisk), we meet, as early as 927, with "totius Britanniæ monarchus, rex, rector, or basileus;" "totius Britanniæ solio sublimatus;" and other phrases of *insular* sovereignty. (Codex Diplom. vol. ii. *passim.* vol. v. 198.) What has been attributed to the imaginary bretwaldas, belonged truly to the kings of the tenth century. And the grandiloquence of their titles is sometimes almost ridiculous. They affected particularly that of basileus, as something more imperial than king, and less easily understood. Edwy and Edgar are remarkable for this pomp, which shows itself also in the spurious charters of older kings. But Edmund and Edred with more truth and simplicity had generally denominated themselves "rex Anglorum, cæterorumque in circuitu persistentium gubernator et rector." (Codex Diplom. vol. ii. *passim.*) An expression which was retained sometimes by Edgar. And though these exceedingly pompous phrases seem to have become less frequent in the next century, we find "totius Albionis rex," and equivalent terms, in all the charters of Edward the Confessor.*

But looking from these charters, where our kings asserted what they pleased, to the actual truth, it may be inquired whether Wales and Scotland were really subject, and in what degree, to the self-styled basileus at Winchester. This is a debatable land, which, as merely his-

* "As a general rule it may be observed, that before the tenth century the proem is comparatively simple; that about that time the influence of the Byzantine court began to be felt; and that from the latter half of that century, pedantry and absurdity struggle for the mastery."—Kemble's Introduction to vol. ii. p. x.

torical antiquities are far from being the object of this Work, I shall leave to national prejudice or philosophical impartiality. Edgar, it may be mentioned, in a celebrated charter, dated in 964, asserts his conquest of Dublin and great part of Ireland: — "Mihi autem concessit propitia divinitas cum Anglorum imperio omnia regna insularum oceani cum suis ferocissimis regibus usque Norwegiam, maximamque partem Hiberniæ cum suâ nobilissimâ civitate Dublinia Anglorum regno subjugare; quos etiam omnes meis imperiis colla subdere, Dei faventi gratiâ, coegi." (Codex Diplom. ii. 404.) No historian mentions any conquest or even expedition of this kind. Sir Francis Palgrave (ii. 258.) thinks the charter "does not contain any expression which can give rise to suspicion; and its tenor is entirely consistent with history:" meaning, I presume, that the silence of history is no contradiction. Mr. Kemble, however, marks it with an asterisk. I will mention here, that an excellent summary of Anglo-Saxon history, from the earliest times to the Conquest, has been drawn up by Sir F. Palgrave, in the second volume of the Rise and Progress of the English Commonwealth.

129.

EORLS AND CEORLS.

Edit. 1826, vol. ii. p. 383, note †. Edit. 1841, vol. ii. p. 65. note ‡.

THE proper division of freemen was into eorls and ceorls; ge eorle — ge ceorle, ge eorlische — ge ceorlische, occur in several Anglo-Saxon texts. The division corresponds to the phrase "gentle and simple," of later times. Palgrave, (p. 11.) agrees with this. Yet in another place (vol. ii. p. 352.) he says "It certainly designated a person of noble race. This is the form in which it is employed in the laws of Ethelbert. The earl and the churl are put in opposition to each other, as the two extremes of society." I cannot assent to this; the second thoughts of my learned friend I like less than the first. It seems like saying,

men and women are the extremes of humanity, or odd and even of number. What was in the middle? * Mr. Kemble, in his Glossary to Beowulf, explains eorl by *vir fortis, pugil vir;* and proceeds thus: — "*Eorl* is not a title, as with us, any more than *beorn* . . . . We may safely look upon the origin of earl, as a title of rank, to be the same as that of the *comites*, who, according to Tacitus, especially attached themselves to any distinguished chief. That these *fideles* became under a warlike prince something more important than the early constitution of our tribes contemplated, is natural, and is, moreover, proved by history, and they laid the foundations of that system which recognises the king as the fountain of honour. In the later Anglo-Saxon constitution, ealdorman was a prince, a governor of a country or small kingdom, *sub-regulus;* he was a constitutional officer; the earl was not an officer at all, though afterwards the government of counties came to be intrusted to him; at first, if he had a *beneficium* or feud at all, it was a horse, or rings, or arms; afterwards, lands. This appears constantly in Beowulf, and requires no further remark." A speech, indeed, ascribed to Withred, king of Kent, in 696, by the Saxon Chronicle, would prove earls to have been superior to aldermen in that early age. But the forgery seems too gross to impose on any one. Ceorl, in Beowulf, is a man, *vir.;* it is sometimes a husband; a woman is said *ceorlian, i. e.* viro se adjungere.

Dr. Lingard has clearly apprehended, and that long before Mr. Kemble's publication, the *distributive* character of the words eorl and ceorl. "Among the Anglo-Saxons, the free population was divided into the eorl and ceorl, the man of noble and ignoble descent;" and he well observes that "by not attending to this meaning of the word eorl and rendering it earl, or rather *comes*, the translators of

* An earlier writer has fallen into the same mistake, which should be corrected, as the equivocal meaning of the word eorl might easily deceive the reader. "Ceorls, or cyrlisc men, are opposed, as the lowest description of freemen, to eorls, as the highest of the nobility." — Heywood "On Ranks among the Anglo-Saxons," p. 278.

the Saxon laws have made several passages unintelligible." (Hist. of England, i. 468.) Mr. Thorpe has not, as I conceive, explained the word as accurately or perspicuously as Mr. Kemble. He says, in his Glossary to Ancient English Laws: — "Eorl, comes, satelles principis. This is the prose definition of the word; in Anglo-Saxon and Old Saxon poetry, it signifies man, though generally applied to one of consideration on account of his rank or valour. Its etymon is unknown, one deriving it from Old Norse, *ar*, minister, satelles; another from *jara*, prœlium." (See B. Hald voc. Jarl, and the Gloss. to Sœmund, by Edda, t. i. p. 597.) This title, which seems introduced by the Jutes of Kent, occurs frequently in the laws of the kings of that district, the first mention of it being in Ethelbert, 13. Its more general use among us dates from the later Scandinavian invasions; and though originally only a title of honour, it became in later times one of office, nearly supplanting the older and more Saxon one of ealdorman." The editor does not here particularly advert to the use of the word in opposition to ceorl. That a word merely expressing man may become appropriate to men of dignity appears from *bar* and *baro;* and something analogous is seen in the Latin *vir*. Lappenberg, (vol. ii. p. 13.) says: — "The title of eorl occurs in early times among the laws of the Kentish kings, but became more general only in the Danish times, and is probably of old Jutish origin." This is a confusion of words; in the laws of the Kentish kings, eorl means only *ingenuus*, or, if we please, *nobilis;* in the Danish times it was *comes*, as has just been pointed out.

Such was the eorl, and such the ceorl, of our forefathers; one a gentleman, the other a yeoman, but both freemen. We are liable to be misled by the new meaning which from the tenth century was attached to the former word, as well as by the inveterate prejudice that nobility of birth must carry with it something of privilege above the most perfect freedom. But we do not appreciate highly enough the value of the latter in a semi-barbarous society. The eorlcundman was generally, though not

necessarily, a freeholder; he might, unless restrained by special tenure, depart from, or alienate his land; he was, if a freeholder, a judge in the county court; he might marry, or become a priest, at his discretion; his oath weighed heavily in compurgation; above all, his life was valued at a high composition; we add, of course, the general respect which attaches itself to the birth and position of a gentleman. Two classes indeed there were, both "eorlcund," or of gentle birth, and so called in opposition to ceorls, but in a relative subordination. Sir F. Palgrave has pointed out the distinction in a passage which I shall extract:—

"The whole scheme of the Anglo-Saxon law is founded upon the presumption that every freeman, not being a 'hlaford,' was attached to a superior, to whom he was bound by fealty, and from whom he could claim a legal protection or warranty, when accused of any transgression or crime. If, therefore, the 'eorlcund' individual did not possess the real property which, either from its tenure or its extent, was such as to constitute a lordship, he was then ranked in the very numerous class whose members, in Wessex and its dependent states, were originally known by the name of 'sithcundmen,' an appellation which we may paraphrase by the heraldic expression, 'gentle by birth and blood.'* This term of sithcundman, however, was only in use in the earlier periods. After the reign of Alfred it is lost; and the most comprehensive and significant denomination given to this class is that of 'sixhœndmen,' indicating their position between the highest and lowest law-worthy classes of society. Other designations were derived from their services and tenures. Radechnights, and lesser thanes, seem to be included in this rank, and to which, in many instances, the general name of sokemen was applied. But, however designated, the sithcundman, or sixhœndman, appears, in every instance, in the same relative position in the community:

* Is not the word sithcundman properly descriptive of his dependence on a lord, from the Saxon verb *sithian*, to follow?

classed amongst the nobility, whenever the eorl and the ceorl are placed in direct opposition to each other; always considered below the territorial aristocracy, and yet distinguished from the villainage by the important right of selecting his hlaford at his will and pleasure. By common right the 'sixhœndman' was not to be annexed to the glebe. To use the expressions employed by the compilers of Domesday, he could 'go with his land wheresoever he chose,' or leaving his land, he might 'commend' himself to any hlaford who would accept of his fealty." (Vol. i. p. 14.)*

It may be pointed out, however, which Sir F. P. has here forgotten to observe, that the distinction of weregild between the twelfhynd and syxhynd was abolished by a treaty between Alfred and Guthrum. (Thorpe's Ancient Laws, p. 66.) This indeed affects only the reciprocity of law between English and Danes. Yet it is certain, that from that time we rarely find mention of the intermediate rank between the twelfhynd, or superior thane, and the twyhynd or ceorl. The sithcundman, it would seem, was from henceforth rated at the same composition as his lord; yet there is one apparent exception (I have not observed any other) in the laws of Henry I. It is said here (C. 76.)—"Liberi alii twyhyndi, alii syxhyndi, alii twelfhyndi. Twyhyndus homo dicitur, cujus wera est 22 solidorum, qui faciunt 4 libras. Twelfhyndus est homo plene nobilis, id est, thainus, cujus wera est 1200 solidorum, qui faciunt libras 25." It is remarkable that, though the syxhyndman is named at first, nothing more is said of him; and the twelfhyndman is defined to be a thane. It appears from several passages that the laws recorded in this treatise are chiefly those of the West Saxons, which differed in some respects from those of Mercia, Kent and the Danish counties. With regard to the word sithcund, which I have said to be found only in

* This right of choosing a lord at pleasure, so little feudal, seems not indisputable enough to warrant so general a proposition. The conditions of tenure in the eleventh century, whatever they may have been, had become exceedingly various.

the age of the Heptarchy, it does occur once or twice in the laws of Edward the Elder. It might be supposed that the Danes had retained the principle of equality among all of gentle birth, common, as we read in Grimm, to the northern nations, which the distinction brought in by the kings of Kent between two classes of eorls or thanes, seemed to contravene. We shall have occasion, however, to quote a passage from the laws of Canute, which indicates a similar distinction of rank among the Danes themselves, whatever might be the rule as to composition for life.

The influence of Danish connexions produced another great change in the nomenclature of ranks. *Eorl* lost its general sense of good birth, and became an official title, for the most part equivalent to alderman, the governor of a shire or district. It is used in this sense, for the first time, in the laws of Edward the Elder. Yet it had not wholly lost its primary meaning, since we find *eorlish* and *ceorlish* opposed, as distributive appellations, in one of Athelstan. (Id. p. 96.) It is said in a sort of compilation, entitled, "On Oaths, Weregilds, and Ranks," subjoined to the laws of Edward the Elder, but bearing no date, that "It was whilom in the laws of the English . . . . that if a thane thrived so that he became an eorl, then was he thenceforth of eorl-right worthy." (Ancient Laws. p. 81.*) But this passage is wanting in one manuscript, though not in the oldest, and we find, just before it, the old distributive opposition of eorl and ceorl. It is certainly a remarkable exception to the common use of the word eorl in any age, and has led Mr. Thorpe to suppose that the rank of earl could be obtained by landed wealth. The learned editor thinks that "these pieces cannot have had a later origin than the period in which they here stand. Some of them are probably much earlier." (p. 76.) But the mention of the "Danish law" in p. 79., seems much

* The references are to the folio edition of "Ancient Laws and Institutes of England," 1840, as published by the Record Commission. I fear this may cause some trouble to those who possess the octavo edition, which is much more common.

against an earlier date; and this is so mentioned as to make us think that the Danes were then in subjection. In the time of Edgar, eorl had fully acquired its secondary meaning; in its original sense it seems to have been replaced by thane. Certain it is that we find thane opposed to ceorl in the later period of Anglo-Saxon monuments, as eorl is in the earlier; as if the law knew no other broad line of demarcation among laymen, saving always the official dignities and the royal family.* And the distinction between the greater and the lesser thanes was not lost, though they were put on a level as to composition. Thus, in the Forest Laws of Canute:—"Sint jam deinceps quattuor ex liberalioribus hominibus qui habent salvas suas consuetudines, quos Angli thegnes appellant, in qualibet regni mei provincia constituti. Sint sub quolibet eorum quattuor ex mediocribus hominibus, quos Angli lesthegenes nuncupant, Dani vero yoongmen vocant, locati." (Ancient Laws, p. 183.) Meantime, the composition for an earl, whether we confine that word to office, or suppose that it extended to the wealthiest landholders, was far higher in the later period than that for a thane, as was also his heriot when that came into use. The heriot of the king's thane was above that of what was called a medial thane, or mesne vassal; the sithcundman, or sixhynder, as I apprehend, of an earlier style.

In the laws of the continental Saxons, we find the rank corresponding to the *eorlcunde* of our own country, denominated *edelingi* or noble, as opposed to the *frilingi* or ordinary freemen. This appellation was not lost in England, and was, perhaps, sometimes applied to nobles, but we find it generally reserved for the royal family.† *Ethel* or noble, sometimes contracted, forms, as is well known,

* "That the thane, at least originally, was a military follower, a holder by military service, seems certain; though, in later times, the rank seems to have been enjoyed by all great landholders, as the natural concomitant of possession to a certain value. By Mercian law, he appears as a 'twelfhynde' man, his 'wer' being 1200 shillings. That this dignity ceased from being exclusively of a military character is evident from numerous passages in the laws, where thanes are mentioned in a judicial capacity, and as civil officers."—Thorpe's Glossary to Ancient Laws, voc. Thegen.

† Thorpe's Glossary.

the peculiar prefix to the names of our Anglo-Saxon royal house. And the word *atheling* was used, not as in Germany for a noble, but a prince; and his composition was not only above that of a thane, but of an alderman. He ranked as an archbishop in this respect, the alderman as a bishop. (Leges Ethelredi, p. 141.) It is necessary to mention this, lest in speaking of the words *eorl* and *ceorl* as originally distributive, I should seem to have forgotten the distinctive superiority of the royal family. But whether this had always been the case I am not prepared to determine. The aim of the later kings, I mean after Alfred, was to carry the monarchical principle as high as the temper of the nation would permit. Hence they prefer to the name of king, which was associated in all the Germanic nations with a limited power, the more indefinite appellations of imperator and basileus. And the latter of these they borrowed from the Byzantine court, liking it rather better than the other, not merely out of the pompous affectation, characteristic of the nation in that period, but because, being less intelligible, it served to strike more awe; and also, probably, because the title of western emperor seemed to be already appropriated in Germany. It was natural that they would endeavour to enhance the superiority of all athelings above the surrounding nobility.

A learned German writer, who distributes freemen into but two classes, considers the *ceorl* of the Anglo-Saxon laws as corresponding to the *ingenuus*, and the *thrall* or *esne*, that is, slave, to the *lidus* of the Continent. "*Adelingus* und *liber*, *nobilis* und *ingenuus*, *edelingus* und *frilingus*, *jarl* und *karl*, stehen hier immer als stand der freien dem der unfreien, dem *servus*, *litus*, *lazzus*, *thrall* entgegen." (Grimm, Deutsche Rechts-Alterthümer, (Gottingen, 1828,) p. 226. *et alibi.*) *Ceorl*, however, he owns to have "etwas befremdendes," something peculiar. "Der sinn ist bald *mas;* bald *liber*, allein *colonus*, *rusticus*, *ignobilis;* die mitte zwischen *nobilis* und *servus*."

It does not appear from the continental laws, that the

litus, or *lidus*, was strictly a slave, but rather a cultivator of the earth for a master, something like the Roman *colonus*, though of inferior estimation.* No slave had a composition due to his kindred by law; the price of his life was paid to his lord. By some of the barbaric laws, one-third of the composition for a *lidus* went to the kindred; the remainder was the lord's share. This indicates something above the Anglo-Saxon *theow* or slave, and yet considerably below the ceorl. The word, indeed, has been puzzling to continental antiquaries; and if, in deference to the authorities of Gothofred and Grimm, we find the *lidi* in the barbaric *læti* of the Roman empire, we cannot think these at least to have been slaves, though they may have become *coloni*. But I am not quite convinced of the identity resting on a slight resemblance of name.

The ceorl, or *villanus*, as we find him afterwards called in Domesday, was not generally an independent freeholder; but his condition was not always alike. He might acquire land; and, if he did this to the extent of five hydes, he became a thane.† He required no en-

* Mr. Spence remarks (Equitable Jurisdiction, p. 51.) — "In the condition of the ceorls, we observe one of the many striking examples of the adaptation of the German to the Roman institutions — the ceorls and servile cultivators or *adscriptitii* in England, as well as in the Continental states, exactly corresponded with the *coloni* and *inquilini* of the Roman provinces." Yet he immediately subjoins — "The condition of the rural slaves of the Germans nearly resembled that of the Roman *coloni* and Anglo-Saxon ceorls," quoting Tacitus, c. 21. But did the Germans, at that time, adapt their institutions to those of the Romans? Do we not rather see here an illustration of what appears to me the true theory, that similarity of laws and customs may often be traced to natural causes in the state of society rather than to imitation? My notion is, that the Germans, through principles of common sympathy among the same tribe, the Romans, through memory of republican institutions carried on into the empire, repudiated the personal servitude of citizens, while they maintained very strict obligations of prædial tenure; and thus the *coloni* of the lower empire on the one hand, the *lidi* and ceorls on the other, were neither absolutely free, nor merely slaves.

"In the Lex Frisiorum," says Sir F. Palgrave, in one of his excellent contributions to the Edinburgh Review (xxxii. 16.), "we find the usual distinctions of *nobilis*, *liber*, and *litus*. The rank of the Teutonic *litus* has been much discussed; he appears to have been a villein, owing many services to his lord, but above the class of slaves." The word villein, it should be remembered, bore several senses: the *litus* was below a Saxon ceorl, but he was also above the villein of Bracton and Littleton.

† This is not in the laws of Athelstan, to which I have referred in p. 384.,

franchisement for this; his own industry might make him a gentleman. This was not the case, at least not so easily, in France. I have interpreted a text in the laws of Alfred (c. 33. in Wilkins, c. 37. in Thorpe), as giving a right to the ceorl, with the consent of his alderman, of changing his lord; that is, leaving the land on which he dwelt. This seems contradictory to other passages; and the general theory of Anglo-Saxon antiquaries has been, that the ceorl, though a freeman, answered analogically, but not strictly, to the *frilingus* of the Saxons, to the *colonus* of the Roman empire, and to the villein, or *homme de poote*, of the feudal lawyers. It appears indeed, by the will of Alfred, published in 1788, that certain ceorls might choose their own lord; and the text of his law above quoted furnishes some ground for supposing that he extended the privilege to all. The editor of his will says—"All ceorls by the Saxon constitution might choose such man for their landlord as they would." (p. 26.) But even though we should think that so high a privilege was conferred by Alfred, it is almost certain that they did not continue to enjoy it. I retract, however, the conjecture that the ceorls generally had been sinking into a lower state before the conquest. For the passages which recognise the capacity of a ceorl to become a thane, are found in the later period of Anglo-Saxon law. And if, by owning five hydes of land he became a thane, it is plain that he might possess a less quantity without reaching that rank. There were therefore ceorls with land of their own, and ceorls without land of their own; ceorls who might commend themselves to what lord they pleased,

nor in any regular statute, but in a kind of brief summary of law, printed by Wilkins and Thorpe. But I think that Sir Francis Palgrave treats this too slightly, when he calls it 'a traditionary notice of an unknown writer, who says, "whilom it was the law of England;" leaving it doubtful whether it were so still, or had been at any definite time.' (Edinb. Rev. xxxiv. 263.) Though this phrase is once used, it is said also expressly:—"If a ceorl be enriched to that degree that he have five hydes of land, and any one slay him, let him be paid for with 2000 thrymsas." (Thorpe, p. 79.) This, a few sentences before, is named as the composition for a thane in the Danelage. And, indeed, though no king's name appears, I have little doubt that these are real statutes, collected probably by some one who has inserted a little of his own.

and ceorls who could not quit the land on which they lived; owing various services to the lord of the manor, but always freemen, and capable of becoming gentlemen.*

In the Anglo-Saxon charters, the Latin words for the cultivators are "manentes" or "casati." Their number is generally mentioned; and sometimes it is the sole description of land, except its title. The French word *manant* is evidently derived from *manentes*. There seems more difficulty about *casati*, which is sometimes used for persons in a state of servitude, sometimes even for vassals (Ducange). In our charters it does not bear the latter meaning. See Codex Diplomaticus, *passim*. Spence on Equitable Jurisdiction (p. 50.).

But when we turn over the pages of Domesday Book, a record of the state of Anglo-Saxon orders of society under Edward the Confessor, we find another kind of difficulty. New denominations spring up, evidently distinguishable, yet such as no information communicated either in that survey or in any other document enables us definitively and certainly to distinguish. Nothing runs more uniformly through the legal documents antecedent to the Conquest, than the broad division of freemen into eorls, afterwards called thanes, and ceorls. In Domesday, which enumerates, as I need hardly say, the inhabitants of every manor, specifying their ranks, not only at the epoch of the survey itself, about 1086, but as they were in the time of King Edward, we find abundant mention of the thanes, generally indeed, but not always, in reference to the last-named period. But the word ceorl never occurs. This is immaterial; for by the name *villani* we have upwards of 108,000. And this word is frequently used in the first Anglo-Norman reigns, as the

* It is said in the Introduction to the Supplementary Records of Domesday, which I quote from Cooper's Account of Public Records (i. 223.), that the word *commendatio* is confined to the three counties in the second volume of Domesday, except that it occurs twice in the Inquisitio Eliensis for Cambridgeshire. But, if this particular word does not occur, we have the sense, in "ire cum terra ubi voluerit," or "quærere dominum ubi voluerit," which meet our eyes perpetually in the first volume of Domesday. The difference of phrases in this record must, in great measure, be attributed to that of the persons employed.

equivalent of ceorl. No one ought to doubt that they expressed the same persons. But we find also a very numerous class, above 82,000, styled *bordarii;* a word unknown, I apprehend, to any other document; certainly not used in the laws anterior to the Conquest. They must, however, have been also ceorls, distinguished by some legal difference, some peculiarity of service or tenure, well understood at the time. A small number are denominated coscetz or cosceti; a word which does in fact appear in one Anglo-Saxon document. There are also several minor denominations in Domesday, all of which, as they do not denote slaves, and certainly not thanes, must have been varieties of the ceorl kind. The most frequent of these appellations is "cotarii."

But, besides these peasants, there are two appellations which it is less easy, though it would be more important, to define. These are the *liberi homines* and the *socmanni*. Of the former Sir Henry Ellis, to whose indefatigable diligence we owe the only real analysis of Domesday Book that has been given, has counted up about 12,300; of the latter, about 23,000, forming together about one-eighth of the whole population, that is, of male adults. This, it must be understood, was at the time of the survey; but there is no appearance, as far as I have observed, that any material difference in the proportion of these respective classes, or of those below them, had taken place. The confiscation fell on the principal tenants. It is remarkable that in Norfolk alone we have 4487 *liberi homines*, and 4588 socmen; the whole enumerated population being 27087. But in Suffolk, out of a population of 20,491 we find 7,470 *liberi homines*, with 1,060 socmen. Thus these two counties contained almost all the *liberi homines* of the kingdom. In Lincolnshire, on the other hand, where 11,504 are returned as socmen, the word *liber homo* does not occur. These Lincolnshire socmen are not, as usual in other counties, mentioned among occupiers of the demesne lands, but mingled with the villeins and bordars; sometimes not standing first in the enumeration, so as to show that, in

one county, they were both a more numerous and more subordinate class than in the rest of the realm.*

The concise distinction between what we should call freehold and copyhold, is made by the forms of entering each manor throughout Domesday Book. *Liberi homines* invariably, and socmen I believe, except in Lincolnshire, occupied the one, *villani* and *bordarii* the other. Hence *liberum tenementum* and *villenagium*. What then, in Anglo-Saxon language, was the *kind* of these two classes? They belong, it will be observed, almost wholly to the Danish counties; not one of either denomination appears in Wessex, as will be seen by reference to Sir H. Ellis's abstract. Were they thanes or ceorls, or a class distinct from both? What was their *were?* We cannot think that a poor cultivator of a few acres, though of his own land, was estimated at 1200 shillings, like a royal thane. The intermediate composition of the sixhyndman would be a convenient guess; but unfortunately this seems not to have existed in the Danelage. We gain no great light from the laws of Edward the Confessor, which fix the *manbote*, or fine to the lord for a man slain, regulated according to the *were* due to his children. Manbote, in Danelage, "de villano et de sokemanno 12 oras; de liberis hominibus, tres marcas." (C. 12.) Thus, in the Danish counties, of which Lincolnshire was one, the socman was estimated like a *villanus*, and much lower than a *liber homo*. The ora is said to have been one-eighth of a mark, consequently the *liber homo*'s manbote was double that of the villein or socman. If this bore a fixed ratio to the were, we have a new and unheard of rank who might be called fourhyndmen. But such a distinction is never met with. It would not in itself be improbable that the *liberi homines* who occupied freehold lands, and

* Socmen are returned in not a few instances as sub-tenants of whole manors, but only in Cambridgeshire and some neighbouring counties. (Ellis's Introd. to Domesday, ii. 389.) But this could, it seems, have only originated in the phraseology of different commissioners; for the counties in which we find socmen so much elevated, had not belonged to the same Anglo-Saxon kingdom; some were East-Anglian, some Mercian, some probably, as Hertfordshire, of the Kent or Wessex law.

owed no prædial service, should be raised in the composition for their lives above common ceorls. But in these inquiries new difficulties are always springing forth.

We must, upon the whole, I conceive, take the socmen for twyhyndi, for ceorls more fortunate than the rest, who had acquired some freehold land, or to whose ancestors, possibly, it had been allotted in the original settlement. It indicates a remarkable variety in the condition of these East-Anglian counties, Norfolk and Suffolk, and a more diffused freedom in their inhabitants. The population, it must strike us, was greatly higher, relatively to their size, than in any other part of England; and the multitude of small manors and of parish churches, which still continue, bespeaks this progress. The socmen, as well as the *liberi homines*, in whose condition there may have been little difference, except in Lincolnshire, where we have seen, that for whatever cause, the socmen were little, if at all, better than the *villani*, were all *commended;* they had all some lord, though bearing to him a relation neither of fief nor of villenage; they could in general, though with some exceptions, alien their lands at pleasure; it has been thought that they might pay some small rent in acknowledgment of commendation; but the one class, undoubtedly, and probably the other, were freeholders in every legal sense of the word, holding by that ancient and respectable tenure, free and common socage, or in a manner at least analogous to it. Though socmen are chiefly mentioned in the Danelage, other obscure denominations of occupiers occur in Wessex and Mercia, which seem to have denoted a similar class. But the style of Domesday is so concise, and so far from uniform, that we are very liable to be deceived in our conjectural inferences from it.

It may be remarked here, that many of our modern writers draw too unfavourable a picture of the condition of the Anglo-Saxon ceorl. Few indeed fall into the capital mistake of Mr. Sharon Turner, by speaking of him as legally in servitude, like the villein of Bracton's age. But we often find a tendency to consider him as in a very uncomfortable condition, little caring "to what lion's paw

he might fall," as Bolingbroke said in 1745, and treated by his lord as a miserable dependant. Half a century since, in the days of Sir William Jones, Granville Sharp, and Major Cartwright, the Anglo-Saxon constitution was built on universal suffrage; every man in his tything a partaker of sovereignty, and sending from his rood of land an annual representative to the Witenagemot. Such a theory could not stand the first glimmerings of historical knowledge in a mind tolerably sound. But while we absolutely deny political privileges of this kind to the ceorl, we need not assert his life to have been miserable. He had very definite legal rights, and acknowledged capacities of acquiring more; that he was sometimes exposed to oppression is probable enough; but, in reality, the records of all kinds that have descended to us, do not speak in such strong language of this as we may read in those of the Continent. We have no insurrection of the ceorls, no outrages by themselves, no atrocious punishment by their masters, as in Normandy. Perhaps we are a little too much struck by their obligation to reside on the lands which they cultivated; the term *ascriptus glebæ* denotes, in our apprehension, an ignoble servitude. It is, of course, inconsistent with our modern equality of rights; but we are to remember, that he who deserted his land, and consequently his lord, did so in order to become a thief. *Hlafordles* men, of whom we read so much, were invariably of this character. What else, indeed, could he become? Children have an idle play, to count buttons, and say: — Gentleman, apothecary, ploughman, thief. Now this, if we consider the second as representative of burgesses in towns, is actually a distributive enumeration, setting aside the clergy, of the Anglo-Saxon population; a thane, a burgess, a ceorl, a hlafordles man; that is, a man without land, lord, or law, who lived upon what he could take. For the sake of protecting the honest ceorl from such men, as well as of protecting the lord in what, if property be regarded at all, must be protected, his rights to services legally due, it was necessary to restrain the cultivator from quitting his land. Excep-

tions to this might occur, as we find among the *liberi homines* and others in Domesday, but it was the general rule. We might also ask, whether a lessee for years at present, is not in one sense, *ascriptus glebæ*. It is true, that he may go wherever he will; and if he continue to pay his rent and perform his covenants, no more can be said. But if he does not this, the law will follow his person; and though it cannot force him to return, will make it by no means his interest to desert the premises. Such remedies as the law now furnishes, were not in the power of the Saxon landlord; but all that any lord could desire was to have the services performed, or to receive a compensation for them.

130.

EXPULSION OF BRITONS.

Edit. 1826, vol. ii. p. 386. Edit. 1841, vol. ii. p. 68.

THOSE who treat this opinion as chimerical, and seem to suppose that a very large portion of the population of England, during the Anglo-Saxon period, must have been of British descent, do not, I think, sufficiently consider—first, the exterminating character of barbarous warfare, not here confined, as in Gaul, to a single and easy conquest, but protracted for two centuries with the most obstinate resistance of the natives; secondly, the facilities which the possessions of the Welsh and Cumbrian Britons gave to their countrymen for retreat; and thirdly, the natural increase of population among the Saxons, especially when settled in a country already reduced into a state of culture. Nor can the successive migrations from Germany and Norway be shown to have been insignificant. Nothing can be scantier than our historical materials for the fifth and sixth centuries. We cannot also but observe, that the silence of the Anglo-Saxon records, at a later time, as to Welsh inhabitants, except in a few passages, affords a presumption that they were not very considerable. Yet

these passages, three or four in number (I do not include those which obviously relate to the independent Welsh, whether Cambrian or Cumbrian), repel the hypothesis that they may have been wholly overlooked and confounded with the ceorls. Their composition was less than that of the ceorl in Wessex and Northumbria; would not this have been mentioned in Kent if they had been found there?

It is by no means unimportant in this question, that we find no mention of bishops or churches remaining in the parts of England occupied by the Saxons before their conversion. If a large part of the population was British, though in subjection, what religion did they profess? If it is said that the worshippers of Thor persecuted the Christian priesthood, why have we no records of it in hagiology? Is it conceivable that all alike, priests and people, of that ancient Church, pusillanimously relinquished their faith? Sir F. Palgrave, indeed, meets this difficulty by supposing that the doctrines of Christianity were never cordially embraced by the British tribes, nor had become the national religion. (Engl. Commonwealth, i. 154.) Perhaps this was in some measure the case, though it must be received with much limitation; for the retention of heathen superstitions was not incompatible in that age with a cordial faith; but it will not account for the disappearance of the original clergy in the English kingdoms. Their persecution, which I do not deny, though we have no evidence of it, would be part of the exterminating system; they fled before it into the safe quarters of Wales. And to obtain the free exercise of their religion was probably an additional motive with the nation, to seek liberty where it was to be found.

It must have struck every one who has looked into Domesday Book, that we find for the most part the same manors, the same parishes, and known by the same names, as in the present age. England had been as completely appropriated by Anglo-Saxon thanes as it was by the Normans who supplanted them. This indeed, only carries us back to the eleventh century. But in all charters, with

which the excellent Codex Diplomaticus supplies us, we find the boundaries assigned; and these, if they do not establish the identity of manors as well as Domesday Book, give us at least a great number of local names, which subsist, of course with the usual changes of language, to this day. If British names of places occur, it is rarely, and in the border counties, or in Cornwall. No one travelling through England would discover that any people had ever inhabited it before the Saxons; save so far as the mighty Rome has left traces of her empire in some enduring walls, and a few names that betray the colonial city, the Londinium, the Camalodunum, the Lindum. And these names show that the Saxons did not systematically innovate, but often left the appellations of places where they found them given. Their own favourite terminations were *ton* and *by*; both words denoting a village or township, like *ville* in French.* In each of these there gradually arose a church, and the ecclesiastical division for the most part corresponds to the civil; though to this, as is well known, there are frequent exceptions. The central point of every township or manor was its lord, the thane to whose court the socagers and ceorls did service; we may believe this to have been so from the days of the Heptarchy, as it was in those of the Confessor.

The *servi* enumerated in Domesday Book are above 25,000, or nearly one-eleventh part of the whole. These seem generally to have been domestic slaves, and partly employed in tending the lord's cattle or swine, as Gurth,

* The word *tun* denotes originally any inclosure. "But its more usual, though restricted sense, is that of a dwelling, a homestead, the house and inland; all, in short, that is surrounded and bounded by a hedge or fence. It is thus capable of being used to express what we mean by the word *town*, viz. a large collection of dwellings; or, like the Scottish town, even a solitary farm-house. It is very remarkable that the largest proportion of the names of places among the Anglo-Saxons should have been formed with this word, while upon the continent of Europe it is never used for such a purpose. In the first two volumes of the Codex Diplomaticus, Dr. Lee computes the proportion of local names compounded with *tun* at one-eighth of the whole number; a ratio which unavoidably leads us to the conclusion, that inclosures were as much favoured by the Anglo-Saxons as they were avoided by their German brethren beyond the sea." —Preface to Kemble's Codex Diplom. vol. iii. p. xxxix.

whom we all remember, the δῖος ὑφορβὸς of the thane Cedric in Ivanhoe. They are never mentioned as occupiers of land, and have nothing to do with the villeins of later times. A genuine Saxon, as I have said, could only become a slave by his own, or his forefather's default, in not paying a weregild, or some legal offence; and of these there might have been many. The few slaves whose names Mr. Turner has collected from Hickes and other authorities, appear to be all Anglo-Saxon. (Hist. of Anglo-Saxons, vol. iii. p. 92.) Several others are mentioned in charters quoted by Mr. Wright, in the 30th volume of the "Archæologia," p. 220. But the higher proportion which *servi* bore to *villani* and *bordarii*, that is, free ceorls, in the western counties, those in Gloucestershire being almost one-third, may naturally induce us to suspect that many were of British origin; and these might be sometimes in prædial servitude. All inference, however, from the census in Domesday as to the particular state of the enumerated inhabitants, must be conjecturally proposed.

131.

REMAINS OF WELSH IN ENGLISH LANGUAGE.

Edit. 1826, vol. ii. p. 387. Edit. 1841, vol. ii. p. 68.

IT is but just to mention a partial exception, according to a considerable authority, to what has been said in the text as to the absence of British roots in the English language; though it can but slightly affect the general proposition. Mr. Kemble remarks the number of minute distinctions in describing the local features of a country, which abound in the Anglo-Saxon charters, and the difficulties which occur in their explanation. One of these relates to the language itself. "It cannot be doubtful that local names, and those devoted to distinguish the natural features of a country, possess an inherent vitality, which even the urgency of conquest is frequently unable to destroy. A race is rarely so entirely removed as not to form an integral,

although subordinate, part of the new state based upon its ruins; and in the case where the cultivator continues to be occupied with the soil, a change of master will not necessarily lead to the abandonment of the names by which the land itself, and the instruments or processes of labour are designated. On the contrary, the conquering race are apt to adopt these names from the conquered; and thus, after the lapse of twelve centuries and innumerable civil convulsions, the principal words of the class described yet prevail in the language of our people, and partially in our literature. Many, then, of the words which we seek in vain in the Anglo-Saxon dictionaries, are, in fact, to be sought in those of the Cymri, from whose practice they were adopted by the victorious Saxons, in all parts of the country; and they are not Anglo-Saxon, but Welsh (*i. e.* foreign, Wylisc) very frequently unmodified either in meaning or pronunciation." (Preface to Codex Diplom. vol. iii. p. 15.) Though this bears intrinsic marks of probability, it is yet remarkable that, in a long list of descriptive words which immediately follows, there are not six for which Mr. Kemble suggests a Cambrian root; and of these some, such as *comb*, a valley, belong to parts of England where the British long kept their ground.

132.

THE WITENAGEMOT.

Edit. 1826, vol. ii. p. 388. Edit. 1841, vol. ii. p. 69.

THE constituent parts of the witenagemot cannot be certainly determined, though few parts of the Anglo-Saxon polity are more important. A modern writer espouses the more popular theory. "There is no reason extant for doubting that every thane had the right of appearing and voting in the witenagemot, not only of his

shire, but of the whole kingdom, without however being bound to personal attendance, the absent being considered as tacitly assenting to the resolutions of those present. (Lappenberg, Hist. of England, vol. ii. p. 317.) Palgrave, on the other hand, adheres to the testimony of the Historia Eliensis, that forty hydes of land were a necessary qualification; which of course would have excluded all but very wealthy thanes. He observes, and I believe with much justice, that "proceres terræ" is a common designation of those who composed a *curia regis*, synonymous, as he conceives, with the witenagemot. Mr. Thorpe ingeniously conjectures, that "inter proceres terræ enumerari" was to have the rank of an earl; on the ground that five hydes of land was a qualification for a common thane, whose heriot, by the laws of Canute, was to that of an earl as one to eight. (Ancient Laws of Anglo-Saxons, p. 81.) Mr. Spence supposes the rank annexed to forty hydes to have been that of king's thane. (Inquiry into Laws of Europe, p. 311.) But they were too numerous for so high a qualification.

Mr. Thorpe explains the word witenagemot thus:— "The supreme council of the nation, or meeting of the witan. This assembly was summoned by the king; and its members, besides the archbishop or archbishops, were the bishops, duces, eorls, thanes, abbots, priests, and even deacons. In this assembly laws, both secular and ecclesiastical, were promulgated and repealed; and charters of grants made by the king confirmed and ratified. Whether this assembly met by royal summons, or by usage at stated periods, is a point of doubt." (Glossary to Ancient Laws.) This is not remarkably explicit: aldermen are distinguished from earls, and *duces*, an equivocal word, from both*; and the important difficulty is slurred over by a

* *Dux* appears to be sometimes used in the subscription of charters for *thane*, more commonly for alderman. Thane is generally, in Latin, *minister*. (Codex Diplomat. *passim*.) Some have supposed *dux* to signify, at least occasionally, a peculiar dignity, called, in Anglo-Saxon, Heretoch (herzog, *Germ.*). This word frequently occurs in the later period. Mr. Thorpe says:—"This

general description, thanes. But, what thanes, remains to be inquired.

The charters of all Anglo-Saxon sovereigns are attested, not only by bishops and abbots, but by laymen, described, if by any Saxon appellation, as aldermen, or as thanes. Their number is not very considerable; and some appear hence to have inferred, that only the superior or royal thanes were present in the witenagemot. But, as the signatures of the whole body could not be required to attest a charter, this is far too precarious an inference. Few, however, probably, are found to believe that the lower thanes flocked to the national council, whatever their rights may have been; and if we have no sufficient proof that any such privileges had been recognised in law or exercised in fact, if we are rather led to consider the sithcundman, or sixhynder, as dependent merely on his lord, in something very analogous to a feudal relation, we may reasonably doubt the strong position which Lappenberg, though following so many of our own antiquaries, has laid down. Probably the traditions of the Teutonic democracy led to the insertion of the assent of the people in some of the Anglo-Saxon laws. But it is done in such a manner as to produce a suspicion, that no substantial share in legislation had been reserved to them. Thus in the preamble of the laws of Withræd, about 696, we read, "The great men decreed, with the suffrages of all, these dooms." Ina's laws are enacted "with all my ealdormen, and the most distinguished witan of my people." Alfred has consulted "his witan." And this is the uniform word in all later laws in Anglo-Saxon. Canute's in Latin run—"Cum consilio primariorum meorum." We have not a hint of any numerous or popular body in the Anglo-Saxon code.

title, among the Anglo-Saxons, was, as it implies, given originally to the leader of an army; but in the latter days of the monarchy it seems to have become hereditary in the families of those on whom the government of the provinces formed out of the kingdoms of the Heptarchy were bestowed, and was sometimes used synonymously with those of ealdorman and eorl."—Glossary, voc. Heretoga.

Sir F. Palgrave (i. 637.) supposes that the laws enacted in the witenagemot were not valid till accepted by the legislatures of the different kingdoms. This seems a paradox, though supported with his usual learning and ingenuity. He admits that Edgar "speaks in the tone of prerogative, and directs his statutes to be observed and transmitted by writ to the aldermen of the other subordinate states." (p. 638.) But I must say that this is not very exact. The words in Thorpe's translation are—"And let many writings be written concerning these things, and sent both to Ælfere, alderman, and to Æthelwine, alderman, and let them [send] in every direction, that this ordinance be known to the poor and rich." (p. 118.) "And yet," Sir F. P. proceeds, "in defiance of this positive injunction, the laws of Edgar were not accepted in Mercia till the reign of Canute the Dane." For this, however, he cites no authority, and I do not find it in the Anglo-Saxon laws. Edgar says:—"And I will that secular rights stand among the Danes with as good laws as they best may choose. But with the English, let that stand which I and my witan have added to the dooms of my forefathers, for the behoof of all the people. Let this ordinance, nevertheless, be common to all the people, whether English, Danes, or Britons, on every side of my dominion." (Thorpe's Ancient Laws, p. 116.) But what does this prove as to *Mercia?* The inference is, that Edgar, when he thought any particular statute necessary for the public weal, enforced it on all his subjects, but did not generally meddle with the Danish usages.

"The laws of the glorious Athelstan had no effect in Kent, the dependent apanage of his crown, until sanctioned by the witan of the shire." It is certainly true that we find a letter addressed to the king in the name of "episcopi tui de Kancia, et omnes Cantescyre thaini, comites et villani," thanking him "quod nobis de pace nostra præcipere voluisti et de commodo nostro quærere et consulere, quia magnum inde nobis est opus divitibus et

pauperibus." But the whole tenor of this letter, which relates to the laws enacted at the witenagemot, or "grand synod" of Greatanlea (supposed near Andover), though it expresses approbation of those laws, and repeats some of them with slight variations, does not in my judgment amount to a distinct enactment of them; and the final words are not very legislative. "Precamur, Domine, misericordiam tuam, si in hoc scripto alterutrum est vel nimis vel minus, ut hoc emendari jubeas secundum velle tuum. Et nos devote parati sumus ad omnia quæ nobis præcipere velis quæ unquam aliquatenus implere valeamus." (P. 91.)

It is, moreover, an objection to considering this as a formal enactment by the witan of the shire, that it runs in the names of "thaini, comites et villani." Can it be maintained that the ceorls ever formed an integrant element of the legislature in the kingdom of Kent? It may be alleged that their name was inserted, though they had not been formally consenting parties, as we find in some parliamentary grants of money much later. But this would be an arbitary conjecture, and the terms "omnes thaini," &c. are very large. By *comites*, we are to understand, not earls, who in that age would not have been spoken of distinctly from thanes, at least in the plural number, nor postponed to them, but thanes of the second order, sithcundmen, sixhynder. Alfred translates "comes" by "gesith," and the meaning is nearly the same.

In the next year we have a very peremptory declaration of the exclusive rights of the king and his witan. "Athelstan, king, makes known, that I have learned that our 'frith' (peace) is worse kept than is pleasing to me, or as at Greatanlea was ordained, and my witan say that I have too long borne with it. Now, I have decreed, with the witan who were with me at Exeter at midwinter, that they [the frithbreakers] shall all be ready, themselves and with wives and property, and with all things, to go whither I will (unless from thenceforth they shall desist) on this condition, that they never come again to the coun-

try. And if they shall ever again be found in the country, that they be as guilty as he who may be taken with stolen goods (hand-habbende)."

133.

BOROUGH MAGISTRATES IN THE WITENAGEMOT.

Edit. 1826, vol. ii. p. 389. Edit. 1841, vol. ii. p. 69.

SIR FRANCIS PALGRAVE, a strenuous advocate for the antiquity of municipal privileges, contends for aldermen, elected by the people in boroughs, sitting and assenting among the king's witan. (Edinb. Rev. xxvi. 26.) "Their seats in the witenagemot were connected as inseparably with their office as their duties in the folkmote. Nor is there any reason for denying to the aldermen of the boroughs the rights and rank possessed by the aldermen of the hundreds; and they, in all cases, were equally elected by the commons." The passage is worthy of consideration, like every thing which comes from this ingenious and deeply read author. But we must be staggered by the absence of all proof, and particularly by the fact that we do not find aldermen of towns, so described, among the witnesses of any royal charter. Yet it is possible that such a privilege was confined to the superior thanes, which weakens the inference. We cannot pretend, I think, to deny, in so obscure an inquiry, that some eminent inhabitants (I would here avoid the ambiguous word citizens) of London, or even other cities, might occasionally be present in the witenagemot. But were not these, as we may confidently assume, of the rank of thane? The position in my text is, that ceorls or inferior freemen had no share in the deliberations of that assembly. Nor would these aldermen, if actually present, have been chosen by the court-leet for that special purpose, but as regular magistrates. "Of this great council," Sir F. P.

says, in another place (Edinb. Rev. xxxiv. 336.), as constituted anterior to the Conquest, we know little more than the name." The greater room, consequently, for hypothesis. In a later work, as has been seen in the last note, Sir F. P. adopts the notion, that forty hydes of land were the necessary qualification for a seat in the witenagemot. This is almost inevitably inconsistent with the presence, as by right, of aldermen elected by boroughs. We must conclude, therefore, that he has abandoned that hypothesis. Neither of the two is satisfactory to my judgment.

134.

DIVISION OF COUNTIES.

Edit. 1826, vol. ii. p. 390. Edit. 1841, vol. ii. p. 70.

FOR the division of counties, which were not always formed in the same age, nor on the same plan, see Palgrave, i. 116. We do not know much about the inland counties in general; those on the coasts are in general larger, and are mentioned in history. All we can say is, that they all existed at the Conquest as at present. The hundred is supposed by Sir H. Ellis, on the authority of an ancient record, to have consisted of an hundred hydes of land, cultivated and waste taken together. (Introduction to Domesday, i. 185.) But this implies equality of size, which is evidently not the case. A passage in the "Dialogus de Scaccario" (p. 31.) is conclusive:—"Hyda a primitiva institutione in centum acris constat: hundredus est ex hydarum aliquot centenariis, sed non determinatis; quidam enim ex pluribus, quidam ex paucioribus hydis constat."

135.

EARL AND THE COUNTY-COURT.

Edit. 1826, vol. ii. p. 392. Edit. 1841, vol. ii. p. 72.

THE word alderman would have been better employed in this place than earl, for the greater part of the Anglo-Saxon age. The alderman was the highest rank after the royal family, to which he sometimes belonged. Every county had its alderman; but the name is not applied in written documents to magistrates of boroughs before the Conquest. (Palgrave, ii. 350.) He thinks, however, that London had aldermen from time immemorial. After the Conquest the title seems to have become appropriated to municipal magistrates.

136.

HUNDRED COURT.

Edit. 1826, vol. ii p. 392. Edit. 1841, vol. ii. p. 72.

THE hundred-court is passed over too slightly in the text, and what is said might have been more accurately expressed. This was held monthly, while that of the county was but twice in the year, as appears by the laws of Edgar (c. 5.), of Canute (c. 18.), and of Henry I. (c. 7.); and it is not now evident to me how I could have thought that there was any ambiguity or fluctuation in that respect. The hundred-court was not properly held before the sheriff, but, under his writ, before its own hundred-man, or *centenarius;* more often styled alderman, and in Norman times, bailiff or constable. It is, in the language of the law, the sheriff's tourn and leet. And in the Anglo-Saxon age, it was a court of justice for suitors

within the hundred, though it could not execute its process beyond that limit. It also punished small offences, and was intrusted with the "view of frank-pledge," and the maintenance of the great police of mutual surety. In some cases, that is, when the hundred was competent to render judgment, it seems that the county-court could only exercise an appellant jurisdiction for denial of right in the lower tribunal. But in course of time the former and more celebrated court, being composed of far more conspicuous judges, and held before the bishop and the earl, became the real arbiter of important suits; and the court-leet fell almost entirely into disuse as a civil jurisdiction, contenting itself with punishing petty offences and keeping up a local police.

The hundred-court, and indeed the hundred itself, do not appear in our Anglo-Saxon code before the reign of Edgar, whose regulations concerning the former are rather full. But we should be too hasty in concluding that it was then first established. Nothing in the language of those laws implies it. A theory has been developed in a very brilliant and learned article of the Edinburgh Review for 1822 (xxxvi. 287.), justly ascribed to Sir F. Palgrave, which deduces the hundred from the *hærad* of the Scandinavian kingdoms, the integral unit of the Scandinavian commonwealths. "The Gothic commonwealth is not an unit of which the smaller bodies politic are fractions. They are the units, and the commonwealth is the multiple. Every Gothic monarchy is in the nature of a confederation. It is composed of towns, townships, shires, bailiwicks, burghs, earldoms, dukedoms, all in a certain degree strangers to each other and separated in jurisdiction. Their magistrates therefore, in theory at least, ought not to emanate from the sovereign.... The strength of the state ascends from region to region. The representative form of government, adopted by no nation but the Gothic tribes, and originally common to them all, necessarily resulted from this federative system, in which the sovereign was compelled to treat the component members as possessing a several authority."

The hundred was as much, according to Palgrave, the organic germ of the Anglo-Saxon commonwealth, as the hærad was of the Scandinavian. Thus the leet, held every month, and composed of the tything-men or head-boroughs, representing the inhabitants, were both the inquest and the jury, possessing jurisdiction, as he conceives, in all cases civil, criminal, and ecclesiastical, though this was restrained after the Conquest. William forbad the bishop or archdeacon to sit there; and by the 17th section of Magna Charta, no pleas of the crown could be held before the sheriff, the constable, the coroner, or other bailiff (inferior officer) of the crown. This was intended to secure for the prisoner, on charges of felony, a trial before the king's justices on their circuits; and from this time, if not earlier, the hundred-court was reduced to insignificance. That, indeed, of the county retaining its civil jurisdiction, as it still does in name, continued longer in force. In the reign of Henry I. or when the customal (as Sir F. Palgrave denominates what are usually called his laws) was compiled (which in fact was a very little later), all of the highest rank were bound to attend at it. And though the extended jurisdiction of the *curia regis* soon cramped its energy, we are justified in saying that the proceedings before the justices of assize were nearly the same in effect as those before the shire-mot. The same suitors were called to attend, and the same duties were performed by them, though under different presidents. The grand jury, it may be remarked, still corresponds, in a considerable degree, to the higher class of landholders bound to attendance in the county-court of the Saxon and Norman periods.

I must request the reader to turn, if he is not already acquainted with it, to this original disquisition in the Edinburgh Review. The analogies between the Scandinavian and Anglo-Saxon institutions are too striking to be disregarded, though some conclusions may have been drawn from them, to which we cannot thoroughly agree. If it is alleged that we do not find, in the ancient customs of

Germany, that peculiar scale of society which ascends from the hundred, as a monad of self-government, to the collective unity of a royal commonwealth, it may be replied that we trace the essential principle in the *pagus*, or *gau*, of Tacitus, though perhaps there might be nothing numerical in that territorial direction; that we have, in fact, the centenary distribution under peculiar magistrates in the old continental laws and other documents; and that a large proportion of the inhabitants of England, ultimately coalescing with the rest, so far at least as to acknowledge a common sovereign, came from the very birthplace of Scandinavian institutions. In the Danelage we might expect more traces of a northern policy than in the south and west; and perhaps they may be found.* Yet we are not to disregard the effect of countervailing agencies, or the evidence of our own records, which attest, as I must think, a far greater unity of power, and a more paramount authority in the crown, throughout the period which we denominate Anglo-Saxon, than, according to the scheme of a Scandinavian commonwealth sketched in the Edinburgh Review, could be attributed to that very ancient and rude state of society. And there is a question that might naturally be asked, how it happens that, if the division by hundreds and the court of the hundred were parts so essential of the Anglo-Saxon commonwealth that all its unity is derived from them, we do not find any mention of either in the numerous laws and other documents which remain before the reign of Edgar in the middle of the tenth century. But I am far from supposing that hundreds did not exist in a much earlier period.

* Vide Leges Ethelredi.

137.

KING'S COURT BEFORE THE CONQUEST.

Edit. 1826, vol. ii. p. 396. Edit. 1841, vol. ii. p. 74.

"THE judicial functions of the Anglo-Saxon monarchs were of a twofold nature; the ordinary authority which the king exercised, like the inferior territorial judges, differing perhaps in degree, though the same in kind; and the prerogative supremacy, pervading all the tribunals of the people, and which was to be called into action when they were unable or unwilling to afford redress. The jurisdiction which he exercised over his own thanes was similar to the authority of any other hlaford; it resulted from the peculiar and immediate relation of the vassal to the superior. Offences committed in the fyrd or army were punished by the king, in his capacity of military commander of the people. He could condemn the criminal, and decree the forfeiture of his property, without the intervention of any other judge or tribunal. Furthermore, the rights which the king had over all men, though slightly differing in "Danelage," from the prerogative which he possessed in Wessex and Mercia, allowed him to take cognizance of almost every offence accompanied by violence and rapine; and amongst these "pleas of the crown," we find the terms, so familiar to the Scottish lawyer and antiquary, of "hamsoken," and "flemen firth," or the crimes of invading the peaceful dwelling, and harbouring the outlawed fugitive. (Rise and Progress of Engl. Commonwealth, vol. i. p. 282.)

Edgar was renowned for his strict execution of justice. "Twice in every year, in the winter and in the spring, he made the circuit of his dominions, protecting the lowly, rigidly examining the judgments of the powerful in each province, and avenging all violations of the law." (Id. p. 286.) He infers from some expressions in the history of Ramsey (Gale, iii. 441.)—"cum more assueto rex Cnuto

regni fines peragraret"—that these judicial eyres continued to be held. It is not at all improbable that such a king as Canute would revive the practice of Edgar; but it was usual in all the Teutonic nations, for the king, once after his accession, to make the circuit of his realm. Proofs of this are given by Grimm, p. 237.

In this royal court the sovereign was at least assisted by his "witan," both ecclesiastic and secular. Their consent was probably indispensable; but the monarchical element of Anglo-Saxon polity had become so vigorous in the tenth and eleventh centuries, that we can hardly apply the old Teutonic principle expressed by Grimm. "All judicial power was exercised by the assembly of freemen, under the presidence of an elective or hereditary superior." (Deutsche Rechts-Alterth. p. 749.) This was the case in the county-court, and perhaps had once been so in the court of the king.

The analogies of the Anglo-Saxon monarchy to that of France during the same period, though not uniformly to be traced, are very striking. The regular jurisdiction over the king's domanial tenants, that over the vassals of the crown, that which was exercised on denial of justice by the lower tribunals, meet us in the two first dynasties of France, and in the early reigns of the third. But they were checked in that country by the feudal privileges, or assumptions of privilege, which rendered many kings of these three races almost impotent to maintain any authority. Edgar and Canute, or even less active princes, had never to contend with the feudal aristocracy. They legislated for the realm; they wielded its entire force; they maintained, not always thoroughly, but in right and endeavour they failed not to maintain, the public peace. The scheme of the Anglo-Saxon commonwealth was better than the feudal; it preserved more of the Teutonic character, it gave more to the common freeman as well as to the king. The love of Utopian romance, and the bias in favour of a democratic origin for our constitution, have led many to overstate the freedom of the Saxon commonwealth; or rather, perhaps, to look less for that freedom

where it is really best to be found, in the administration of justice, than in representative councils, which authentic records do not confirm. But in comparison to France or Italy, perhaps to Germany, with the exception of a few districts which had preserved their original customs, we may reckon the Anglo-Saxon polity, at the time when we know most of it, from Alfred to the Conquest, rude and defective as it must certainly appear when tried by the standard of modern ages, not quite unworthy of those affectionate recollections which long continued to attach themselves to its name.

The most important part, perhaps, of the jurisdiction exercised by the Anglo-Saxon kings, as by those of France, was *ob defectum justitiæ*, where redress could not be obtained from an inferior tribunal, a case of no unusual occurrence in those ages. It forms, as has been shown in the second Chapter, a conspicuous feature in that feudal jurisprudence which we trace in the establishments of St. Louis, and in Beaumanoir. Nothing could have a more decided tendency to create and strengthen a spirit of loyalty towards the crown, a trust in its power and paternal goodness. "The sources of ordinary jurisdiction," says Sir F. Palgrave, "however extensive, were less important than the powers assigned to the king as the lord and leader of his people; and by which he remedied the defects of the legislation of the state, speaking when the law was silent, and adding new vigour to its administration. It was to the royal authority that the suitor had recourse when he could not obtain 'right at home,' though this appeal was not to be had, until he had thrice 'demanded right' in the hundred. If the letter of the law was grievous or burdensome, the alleviation was to be sought only from the king.* All these doctrines are to be discerned in the practice of the subsequent ages; in this place it is only necessary to remark, that the principle of law which denied the king's help in civil suits, until an endeavour had first been made to obtain redress in the

* Edgar II. 2.; Canute II. 16.; Ethelred, 17.

inferior courts, became the leading allegation in the 'Writ of Right Close,' this prerogative process being founded upon the default of the lord's court, and issued lest the king should hear any more complaints of want of justice. And the alleviation of 'the heavy law' is the primary source of the authority delegated by the king to his council, and afterwards assumed by his chancery and chancellor, and from whence our courts of equity are derived." (Rise and Progress of English Commonwealth, vol. i. p. 203.) I hesitate about this last position; the "heavy law" seems to have been the legal fine or penalty for an offence. (Leges Edgar. *ubi supra*.)

That there was a select council of the Anglo-Saxon kings, distinct from the witenagemot, and in constant attendance upon them, notwithstanding the opinion of Madox and of Allen (Edinb. Rev. xxxv. 8.), appears to be indubitable. "From the numerous charters granted by the kings to the Church and to their vassals, which are dated from the different royal vills or manors wherein they resided in their progresses through their dominions, it would appear that there were always a certain number of the optimates in attendance on the king, or ready to obey his summons, to act as his council when circumstances required it. This may have been what afterwards appears as the select council." (Spence's Equitable Jurisdict. p. 72.) The charters published by Mr. Kemble in the Codex Ang.-Sax. Diplomaticus, are attested by those whom we may suppose to have been the members of this council, with the exception of some, which, by the number of witnesses and the importance of the matter, were probably granted in the witenagemot.

The jurisdiction of the king is illustrated by the laws of Edgar. "Now this is the secular ordinance which I will that it be held. This then is just what I will; that every man be worthy of folk-right, as well poor as rich; and that righteous dooms be judged to him; and let there be that remission in the 'bot' as may be becoming before God and tolerable before the world. And let no man apply to the king in any suit, unless he at home may not

be worthy of law, or cannot obtain law.' If the law be too heavy, let him seek a mitigation of it from the king; and for any *bot-worthy* crime let no man forfeit more than his 'wer.'" (Thorpe's Ancient Laws, p. 112.) *Bot* is explained in the glossary, "amends, atonement, compensation, indemnification."

This law seems not to include appeals for false judgment, in the feudal phrase. But they naturally come within the spirit of the provision; and "injustum judicium" is named in Leges Henr. Primi, c. 10, among the exclusive pleas of the crown. It does not seem clear to me, as Palgrave assumes, that the disputes of royal thanes with each other came before the king's court. Is there any ground for supposing that they were exempt from the jurisdiction of the county-court? Doubtless, when powerful men were at enmity, no petty court could effectively determine their quarrel, or prevent them from having recourse to arms; such suits would fall naturally into the king's own hands. But the jurisdiction might not be exclusively his; nor would it extend, as of course, to every royal thane; some of whom might be amenable, without much difficulty, to the local courts. It is said in the seventh chapter of the laws of Henry I., which are Anglo-Saxon in substance, concerning the business to be transacted in the county-court, where bishops, earls, and others, as well as "barons and vavassors," that is, king's thanes and inferior thanes in the older language of the law, were bound to be present:— "Agantur itaque primo debita verè Christianitatis jure; secundo regis placita; postremo causæ singulorum dignis satisfactionibus expleantur." The notion that the king's thanes resorted to his court, as to that of their lord or common superior, is merely grounded on feudal principles; but the great constitutional theory of jurisdiction in Anglo-Saxon times, as Sir F. Palgrave is well aware, was not feudal, but primitive Teutonic.

"The witenagemot," says Allen, "was not only the king's legislative assembly, but his supreme court of judicature." Edinb. Rev. xxxv. 9; referring for proofs to Turner's History of the Anglo-Saxons. Nothing can be

less questionable than that civil as well as criminal jurisdiction fell within the province of this assembly. But this does not prove that there was not also a less numerous body, constantly accessible, following the king's person, and though not, perhaps, always competent in practice to determine the quarrels of the most powerful, ready to dispose of the complaints which might come before it from the hundred or county courts for delay of justice or manifest wrong. Sir F. Palgrave's arguments for the existence of such a tribunal before the Conquest, founded on the general spirit and analogy of the monarchy, are of the greatest weight. But Mr. Allen had acquired too much a habit of looking at the popular side of the constitution, and, catching at every passage which proved our early kings to have been limited in their prerogative, did not quite attend enough to the opposite scale.

138.

TRIAL BY JURY.

Edit. 1826, vol. ii. p. 401. Edit. 1841, vol. ii. p. 78.

THOUGH the following note relates to a period subsequent to the Conquest, yet, as no better opportunity will occur for following up the very interesting inquiry into the origin and progress of trial by jury, I shall place here what appears most worthy of the reader's attention. And, before we proceed, let me observe that the twelve thanes, mentioned in the law of Ethelred, quoted p. 399. (p. 76.), appear to have been clearly analogous to our grand juries. Their duties were to present offenders; they corresponded to the scabini or échevins of the foreign laws. Palgrave has, with his usual clearness, distinguished both compurgators, such as were previously mentioned in the text, and these thanes from real jurors. "Trial by compurgators offers many resemblances to a jury; for the dubious suspicion that fell upon the culprit might often be decided by their knowledge of his general conduct and conversa-

tion, or of some fact or circumstance which convinced them of his innocence. The thanes or échevins may equally be confounded with a jury; since the floating, customary, unwritten law of the country was a fact to be ascertained from their belief and knowledge, and, unlike the suitors, they were sworn to the due discharge of their duty. Still, each class will be found to have some peculiar distinction. Virtually elected by the community, the échevins constituted a permanent magistracy, and their duty extended beyond the mere decision of a contested question; but the jurors, when they were traversers, or triers of the issue, were elected by the king's officers, and impanelled for that time and turn. The juror deposed to facts, the compurgator pledged his faith."—English Commonw. i. 248.

In the Anglo-Saxon laws, we find no trace of the trial of offences by the judgment, properly so called, of peers, though civil suits were determined in the county court. The party accused by the twelve thanes, on their presentment, or perhaps by a single person, was to sustain his oath of innocence by that of compurgators, or by some mode of ordeal. It has been generally doubted whether trial by combat were known before the Conquest; and distinct proofs of it seem to be wanting. Palgrave, however, thinks it rather probable, that, in questions affecting rights in land it may sometimes have been resorted to (p. 224.). But let us now come to trial by jury, both in civil and criminal proceedings, as it slowly grew up in the Norman and later periods; erasing from our minds all prejudices about its English original, except in the form already mentioned of the grand inquest for presentment of offenders, and in that which the passage quoted in the text from the History of Ramsey furnishes—the reference of a suit already commenced, by consent of both parties, to a select number of sworn arbitrators. I have neglected to observe, in this quotation, that the thirty-six thanes were to be upon oath, and consequently came very near to a jury.

The period between the Conquest and the reign of Henry II. is one in which the two nations, not yet blended by the effects of intermarriage, and retaining the pride of

superiority on the one hand, the jealousy of a depressed but not vanquished spirit on the other, did not altogether fall into a common law. Thus we find in a law of the Conqueror, that while the Englishman accused of a crime by a Norman had the choice of trial by combat or by ordeal, the Norman must meet the former, if his English accuser thought fit to encounter him; but if he dared not, as the insolence of the victor seems to presume, it was sufficient for the foreigner to purge himself by the oaths of his friends, according to the custom of Normandy. — Thorpe, p. 210.

We have next in the Leges Henrici Primi, a treatise compiled, as I have mentioned, under Stephen, and not intended to pass for legislative*, numerous statements as to the usual course of procedure, especially on criminal charges. These are very carelessly put together, very concise, very obscure, and, in several places, very corrupt. It may be suspected, and cannot be disproved, that in some instances the compiler has copied old statutes of the Anglo-Saxon period, or recorded old customs, which had already become obsolete. But be this as it may, the Leges Henrici Primi still are an important document for that obscure century which followed the Norman invasion. In this treatise we find no allusion to juries; the trial was either before the court of the hundred or that of the territorial judge, assisted by his free vassals. But we do find the great original principle, trial by peers, and as it is called, *per pais*; that is, in the presence of the country, opposed to a distant and unknown jurisdiction; a principle truly derived from Saxon, though consonant also to Norman law, dear to both nations, and guaranteed to both, as it was claimed by both, in the 29th section of Magna Charta. "Unusquisque per pares suos judicandus est, et ejusdem provinciæ; peregrina autem judicia modis

* It may be here observed, that, in all probability, the title, Leges Henrici Primi, has been continued to the whole book from the first two chapters, which do really contain laws of Henry I., namely, his general charter, and that to the city of London. A similar inadvertence has caused the well known book, commonly ascribed to Thomas à Kempis, to be called "De Imitatione Christi," which is merely the title of the first chapter.

omnibus submovemus." (Leges H. I. c. 31.) It may be mentioned by the way, that these last words are taken from a capitulary of Ludovicus Pius, and that the compiler has been so careless as to leave the verb in the first person. Such an inaccuracy might mislead a reader into the supposition, that he had before him a real law of Henry I.

It is obvious that, as the court had no function but to see that the formalities of the combat, the ordeal, or the compurgation were duly regarded, and to observe whether the party succeeded or succumbed, no oath from them, nor any reduction of their numbers could be required. But the law of Normandy had already established the inquest by sworn recognitors, twelve or twenty-four in number, who were supposed to be well acquainted with the facts; and this in civil as well as criminal proceedings. We have seen an instance of it, not long before the Conquest, among ourselves, in the history of the monk of Ramsey. It was in the development of this amelioration in civil justice, that we find instances during this period (Sir F. Palgrave has mentioned several) where a small number have been chosen from the county court, and sworn to declare the truth, when the judge might suspect the partiality or ignorance of the entire body. Thus in suits for the recovery of property, the public mind was gradually accustomed to see the jurisdiction of the freeholders in their court transferred to a more select number of sworn and well informed men. But this was not yet a matter of right, nor even probably of very common usage. It was in this state of things that Henry II. brought in the assize of novel disseisin.

This gave an alternative to the tenant, on a suit for the recovery of land, if he chose not to risk the combat, of putting himself on the assize; that is, of being tried by four knights summoned by the sheriff, and twelve more selected by them, forming the sixteen sworn recognitors, as they were called, by whose verdict the cause was determined. "Est autem magna assisa," says Glanvil (lib. ii. c. 7.) "regale quoddam beneficium, clementia principis de consilio

procerum populis indultum, quo vitæ hominum et statûs integritati tam salubriter consulitur, ût in jure quod quis in libero soli tenemento possidet retinendo duelli casum declinare possint homines ambiguum. Ac per hoc contingit insperatæ et prematuræ mortis ultimum evadere supplicium, vel saltem perennis infamiæ opprobrium, illius infesti et inverecundi verbi quod in ore victi turpiter sonat consecutivum.* Ex æquitate autem maximâ prodita est legalis ista institutio. Jus enim quod post multas et longas dilationes vix evincitur per duellum, per beneficium istius constitutionis commodius et acceleratius expeditur." The whole proceedings on an assize of novel disseisin, which was always held in the king's court, or that of the justices itinerant, and not before the county or hundred, whose jurisdiction began in consequence rapidly to decline, are explained at some length by this ancient author, the chief justiciary of Henry II.

Changes not less important were effected in criminal processes during the second part of the Norman period, which we consider as terminating with the accession of Edward I. Henry II. abolished the ancient privilege of compurgation by the oaths of friends, the manifest fountain of unblushing perjury; though it long afterwards was preserved in London and in boroughs, by some exemption which does not appear. This, however, left the favourite, or at least the ancient and English, mode of defence, by chewing consecrated bread, handling hot iron, and other tricks called ordeals. But near the beginning of Henry III.'s reign, the church, grown wiser and more fond of her system of laws, abolished all kinds of ordeal in the fourth Lateran council. The combat remained; but it was not applicable unless an injured prosecutor, or appellant, came forward to demand it. In cases where a party was only charged on vehement suspicion of a crime, it was necessary to find a substitute for the forbidden superstition. He might be compelled, by a statute of Henry II., to abjure the realm. A writ of 3 Henry III. directs that those

* This was the word *craven*, or begging for life, which was thought the utmost disgrace.

against whom the suspicions were very strong, should be kept in safe custody. But this was absolutely incompatible with English liberty and with Magna Charta. "No further enactment," says Sir F. Palgrave, "was made; and the usages which already prevailed led to a general adoption of the proceeding which had hitherto existed as a privilege or as a favour, that is to say, of proving or disproving the testimony of the first set of inquest-men, by the testimony of a second array; and the individual, accused by the appeal, or presented by the general opinion of the hundred, was allowed to defend himself by the particular testimony of the hundred to which he belonged. For this purpose another inquest was impannelled, sometimes composed of twelve persons, named from the 'visne', and three from each of the adjoining townships; and sometimes the very same jurymen who had presented the offence, might, if the culprit thought fit, be examined a second time, as the witnesses or inquest of the points in issue. But it seems worthy of remark, that 'trial by inquest' in criminal cases never seems to have been introduced, except into those courts which acted by the king's writ or commission. The presentment or declaration of those officers which fell within the cognisance of the hundred jury, or the leet jury, the representatives of the ancient échevins, was final and conclusive; no traverse or trial by a second jury, in the nature of a petty jury, being allowed" (p. 269.).

Thus trial by a petty jury upon criminal charges came in; it is of the reign of Henry III., and not earlier. And it is to be remarked, as a confirmation of this view, that no one was compellable to plead; that is, the inquest was to be of his own choice. But if he declined to endure it, he was remanded to prison, and treated with a severity which the statute of Westminster I., in the third year of Edward I., calls *peine forte et dure*; extended afterwards, by a cruel interpretation, to that atrocious punishment on those who refused to stand a trial, commonly in order to preserve their lands from forfeiture, which was not taken away by law till the last century.

Thus was trial by jury established, both in real actions,

or suits affecting property in land, and in criminal procedure, the former preceding by a little the latter. But a new question arises as to the province of these early juries; and the view lately taken is very different from that which has been commonly received.

The writer whom we have so often had occasion to quote, has presented trial by jury in what may be called an altogether new light; for though Reeves, in his "History of the English Law," almost translating Glanvil and Bracton, could not help leading an attentive reader to something like the same result, I am not aware that any thing approaching to the generality and fulness of Sir Francis Palgrave's statements can be found in any earlier work than his own.

"Trial by jury, according to the old English law, was a proceeding essentially different from the modern tribunal, still bearing the same name, by which it has been replaced; and, whatever merits belonged to the original mode of judicial investigation—and they were great and unquestionable, though accompanied by many imperfections—such benefits are not to be exactly identified with the advantages now resulting from the great bulwark of English liberty. Jurymen, in the present day, are triers of the issue: they are individuals who found their opinion upon the evidence, whether oral or written, adduced before them; and the verdict delivered by them is their declaration of the judgment which they have formed. But the ancient jurymen were not impannelled to examine into the credibility of the evidence: the question was not discussed and argued before them: they, the jurymen, were the witnesses themselves; and the verdict was substantially the examination of these witnesses, who, of their own knowledge, and without the aid of other testimony, afforded their evidence respecting the facts in question, to the best of their belief. In its primitive form, a trial by jury was, therefore, only a trial by witnesses; and jurymen were distinguished from any other witnesses only by customs which imposed upon them the obligation of an oath, and regulated their number, and which prescribed

their rank, and defined the territorial qualifications from whence they obtained their degree and influence in society.

"I find it necessary to introduce this description of the ancient 'Trial by Jury;' because, unless the real functions of the original jurymen be distinctly presented to the reader, his familiar knowledge of the existing course of jurisprudence will lead to the most erroneous conclusions. Many of those who have descanted upon the excellence of our venerated national franchise seem to have supposed that it has descended to us unchanged from the days of Alfred; and the patriot who claims the jury as the 'judgment by his peers,' secured by Magna Charta, can never have suspected how distinctly the trial is resolved into a mere examination of witnesses." (Palgrave, i. 243.)

This theory is sustained by a great display of erudition, which fully establishes that the jurors had such a knowledge, however acquired, of the facts, as enabled them to render a verdict, without hearing any other testimony, in open court, than that of the parties themselves, fortified, if it might be, by written documents adduced. Hence the knights of the grand assize are called recognitors, a name often given to others sworn on an inquest. In the Grand Coustumier of Normandy, from which our writ of right was derived, it is said that those are to be sworn, "who were born in the neighbourhood, and who have long dwelt there; and such ought they to be, that it may be believed they know the truth of the case, and that they will speak the truth when they shall be asked." This was the rule in our own grand assize. The knights who appeared in it ought to be aequainted with the truth, and if any were not so, they were to be rejected, and others chosen until twelve were unanimous witnesses. Glanvil (lib. ii.) furnishes sufficient proof, if we may depend on the language of the writs which he there inserts. It is to be remembered, that the transactions upon which an assize of modern disseisin, or writ of right, would turn, might frequently have been notorious. In the eloquent language of Sir F. Palgrave, "the forms, the festivities, and the ceremonies accompanying the hours of joy and the days of

sorrow, which form the distinguishing epochs in the brief chronicle of domestic life, impressed them upon the memory of the people at large. The parchment might be recommended by custom, but it was not required by law; and they had no registers to consult, no books to open. By the declaration of the husband at the church door, the wife was endowed in the presence of the assembled relations, and before all the merry attendants of the bridal train. The birth of the heir was recollected by the retainers who had participated in the cheer of the baronial hall; and the death of the ancestor was proved by the friends, who had heard the wailings of the widow, or who had followed the corpse to the grave. Hence trial by jury was an appeal to the knowledge of the country; and the sheriff, in naming his panel, performed his duty by summoning those individuals from amongst the inhabitants of the country who were best acquainted with the points at issue. If, from peculiar circumstances, the witnesses of a fact were previously marked out and known, then they were particularly required to testify. Thus, when a charter was pleaded, the witnesses named in the attesting clause of the instrument, and who had been present in the folkmoot, the shire, or the manor court, when the seal was affixed by the donor, were included in the panel; and when a grant had been made by parol, the witnesses were sought out by the sheriff and returned upon the jury." (Palgrave, p. 248.)

Several instances of *recognition*, that is, of jurors finding facts on their own knowledge, occur in the very curious chronicle of Jocelyn de Brakelonde, published by the Camden Society, long after the "Rise and Progress of the Commonwealth." One is on a question, whether certain land was liberum feudum ecclesiæ an non. "Cumque inde summonita fuit recognitio 12 militum in curia regis faciendâ, facta est in curia abbatis apud Herlavum per licentiam Ranulfi de Glanvilla, et juraverunt recognitores se nunquam scivisse illam terram fuisse separatam ab ecclesiâ." (p. 45.) Another is still more illustrative of the personal knowledge of the jury overruling written evidence. A

recognition was taken as to the right of the abbey over three manors. "Carta nostra lecta in publico nullam vim habuit, quia tota curia erat contra nos. Juramento facto, dixerunt milites se nescire de cartis nostris, nec de privatis conventionibus; sed se credere dixerunt, quod Adam et pater ejus et avus a centum annis retro tenuerunt maneria in feudum firmum, unusquisque post alium, diebus quibus fuerunt vivi et mortui, et sic disseisiati sumus per judicium terræ" (p. 91.).

This "judgment of the land" is, upon Jocelyn's testimony, rather suspicious; since they seem to have set common fame against a written deed. But we see by it, that although parol testimony might not be generally admissible, the parties had a right to produce documentary evidence in support of their title.

It appears at first to be an obvious difficulty in the way of this general resolution of jurors into witnesses, or of witnesses into jurors, that many issues, both civil and criminal, required the production of rather more recondite evidence than common notoriety. The known events of family history, which a whole neighbourhood could attest, seem not very likely to have created litigation. But even in those ages of simplicity, facts might be alleged, the very ground-work of a claim to succession, as to which no assize of knights could speak from personal knowledge. This, it is said, was obviated by swearing the witnesses upon the panel, so that those who had a real knowledge of the facts in question might instruct their fellow jurors. Such, doubtless, was the usual course; but difficulties would often stand in the way. Glanvil meets the question, What is to be done if no knights are acquainted with the matter in dispute? by determining that persons of lower degree may be sworn. But what if women or villeins were the witnesses? What again, if the course of inquiry should render fresh testimony needful? It must appear, according to all our notions of judicial evidence, that these difficulties must not only have led to the distinction of jurors from witnesses, but that no great length of time could have elapsed before the necessity of making

it was perceived. Yet our notions of judicial evidence are not very applicable to the thirteenth century. The records preserved give us reason to believe that common fame had great influence upon these early inquests. In criminal inquiries, especially, the previous fame of the accused seems to have generally determined the verdict. He was not allowed to sustain his innocence by witnesses; a barbarous absurdity, as it seems, which was gradually removed by indulgence alone; but his witnesses were not sworn till the reign of Mary. If, however, the prosecutor or appellant, as he was formerly styled, was under an equal disability, the inequality will vanish, though the absurdity will remain. The prisoner had originally no defence, unless he could succeed in showing the weakness of the appellant's testimony, but by submitting to the ordeal, or combat, or by the compurgation of his neighbours. The jurors when they acquitted him stood exactly in the light of these; it was a more refined and impartial compurgation, resting on their confidence in his former behaviour. Thus let us take a record quoted by Palgrave, vol. ii. p. 184. "*Robertus* filius *Roberti de Ferrariis* appellat *Ranulfum de Fatteswarthe* quod ipse venit in gardinum suum, in pace domini Regis, et nequiter assultavit *Rogerum* hominem suum, et eum verberavit et vulneravit, ita quod de vitâ ejus desperabatur; et ei robavit unum pallium et gladium et arcum et sagittas; et idem *Rogerus* offert hoc probare per corpus suum, prout curia consideraverit; et *Ranulphus* venit et defendit totum de verbo in verbum, et offert domino Regi unam marcam argenti pro habenda inquisitione per legales milites, utrum culpabilis sit inde, necne; et præterea dicit quod iste *Rogerus* nunquam ante appellavit eum, et petit ut hoc ei allocetur,—oblatio recipitur.—Juratores dicunt quod revera contencio fuit inter gardinarium prædicti *Roberti*, *Osmund* nomine, et quosdam garciones, sed *Ranulfus* non fuit ibi, nec malecredunt eum, de aliqua roberia, vel de aliquo malo, facto eidem."

We have here a trial by jury in its very beginning, for the payment of one mark by the accused, in order to have

an inquest instead of the combat, shows that it was not become a matter of right. We may observe that, though Robert was the prosecutor, his servant Roger, being the aggrieved party, and capable of becoming a witness, was put forward as the appellant, ready to prove the case by combat. The verdict seems to imply that the jury had no bad opinion of Ranulf the appellee.

The fourteenth book of Glanvil contains a brief account of the forms of criminal process in his age; and here it appears that a woman could only be a witness, or rather an appellant, where her husband had been murdered, or her person assaulted. The words are worth considering:— "Duo sunt genera homicidiorum; unum est, quod dicitur murdrum, quod nullo vidente, nullo sciente, clam perpetratur, præter solum interfectorem et ejus complices; ita quod mox non assequatur clamor popularis juxta assisam super hoc proditam. In hujusmodi autem accusatione non admittitur aliquis, nisi fuerit de consanguinitate ipsius defuncti. Est et aliud homicidium quod constat in generali vocabulo, et dicitur simplex homicidium. In hoc etiam placito non admittitur aliquis accusator ad probationem, nisi fuerit mortuo consanguinitate conjunctus, vel homagio vel dominio, *ita ut de morte loquatur, ut sub visus sui testimonio.* Præterea sciendum quod in hoc placito mulier auditur accusans aliquem de morte viri sui, *si de visu loquatur* (l. xiv. c. 3.). Tenetur autem mulier quæ proponit se à viro oppressam in pace domini regis, mox dum recens fuerit maleficium vicinam villam adire, et ibi injuriam sibi illatam probis hominibus ostendere, et sanguinem, si quis fuerit effusus, et vestium scissiones; dehinc autem apud præpositum hundredi idem facit. Postea quoque in pleno comitatu id publice proponat. Auditur itaque mulier in tali casu aliquem accusans, sicut et de aliâ quâlibet injuriâ corpori suo illatam solet audiri" (c. 6.).

Thus it appears that on charges of secret murder the kindred of the deceased, but no others, might be heard in court, as witnesses to common suspicion, since they could be no more. I add the epithet *secret*; but it was at that

time implied in the word *murdrum*. But in every case of open homicide, the appellant, be it the wife or one of his kindred, his lord or vassal, must have been actually present. Other witnesses probably, if such there were, would be placed on the panel. The woman was only a prosecutrix; and, in the other sex, there is no doubt that the prosecutor's testimony was heard.

In claims of debt it was in the power of the defendant to wage his law; that is, to deny on oath the justice of the demand. This he was to sustain by the oaths of twelve compurgators, who declared their belief that he swore the truth; and if he declined to do this it seems that he had no defence. But in the writ of right or other process affecting real estate, the wager of law was never allowed; and even in actions of debt the defendant was not put to this issue, until witnesses for the plaintiff had been produced, "sine testibus fidelibus ad hoc inductis." This, however, was not in presence of a jury, but of the bailiff or judge (Magna Charta, c. 28.), and therefore does not immediately bear on the present subject.

In litigation before the king's justices, in the curia regis, it must have been always necessary to produce witnesses, though if their testimony were disputed, it was necessary to recur to a jury in the county, unless the cause were of a nature to be determined by duel. A passage in Glanvil will illustrate this. A claim of villenage, when liberty was pleaded, could not be heard in the county court, but before the king's justices in his court. "Utroque autem præsente in curiâ hoc modo dirationabitur libertas in curiâ, siquidem producit is qui libertatem petit, plures de proximis et consanguineis de eodem stipite unde ipse exierit exeuntes, per quorum libertates, si fuerint in curiâ recognitæ et probatæ, liberabitur à jugo servitutis is qui ad libertatem proclamatur. Si vero contra dicatur status libertatis eorundem productorum vel de eodem dubitatur, ad vicinetum erit recurrendum; ita quod per ejus veredictum sciatur utrum illi liberi homines an non, et secundum dictum

vicineti judicabitur" (l. ii. c. 4.). The plea of villenage was never tried by combat.

It is the opinion of Lord Coke, that a single accuser was not sufficient, at common law, to convict any one of high treason; in default of a second witness, "it shall be tried before the constable or marshal by combat, as by many records appeareth." (3 Inst. 26.) But, however this might be, it is evident that as soon as the trial of peers of the realm for treason or felony in the court of the high steward became established, the practice of swearing witnesses on the panel must have been relinquished in such cases. "That two witnesses be required appeareth by our books, and I remember no authority in our books to the contrary. And this seemeth to be the more clear in the trial by the peers or nobles of the realm, because they come not *de aliquo vicineto*, whereby they might take notice of the fact in respect of vicinity, as other jurors may do." (Ibid.) But the court of the high steward seems to be no older than the reign of Henry IV., at which time the examination of witnesses before common juries was nearly, or completely, established in its modern form; and the only earlier case we have, if I remember right, of the conviction of a peer in parliament, that of Mortimer, in the 4th of Edward III., was expressly grounded on the notoriousness of the facts. (Rot. Parl. ii. 53.) It does not appear, therefore, indisputable by precedent, that any witnesses were heard, save the appellant, on trial of peers of the realm in the twelfth or thirteenth centuries, though it is by no means improbable that such would have been the practice.

Notwithstanding such exceptions, however, sufficient proofs remain, that the jury themselves, especially in civil cases, long retained their character of witnesses to the fact. If the recognitors, whose name bespeaks their office, were not all so well acquainted with the matters in controversy as to believe themselves competent to render a verdict, it was the practice to *afforce* the jury, as it was called, by rejecting these and filling their places with more sufficient witnesses, until twelve were found who agreed

in the same verdict.* (Glanvil, l. ii. c. 17.) Not that unanimity was demanded, for this did not become the rule till about the reign of Edward III.; but twelve, as now on a grand jury, must concur.† And though this profusion of witnesses seems strange to us, yet what they attested (in the age at least of Glanvil and for some time afterwards) was not, as at present, the report of their senses to the fact in issue, but all which they had heard and believed to be true; above all, their judgment as to the respective credibility of the demandant and tenant, heard in that age personally, or the appellant and appellee in a prosecution.

Bracton speaks of afforcing a panel by the addition of better-informed jurors to the rest, as fit for the court to order; "de consilio curiæ affortietur assisa ita quod apponantur alii juxta numerum majoris partis quæ dissenserit, vel saltem quatuor vel sex, et adjungantur aliis." The method of rejection used in Glanvil's time seems to have been altered. But in the time of Britton, soon afterwards, this afforcement, it appears, could only be made with the consent of the parties; though if, as his language seems to imply, the verdict was to go against the party refusing to have the jury afforced, no one would be likely to do so. Perhaps he means that this refusal would create a prejudice in the minds of the jury almost certain to produce such a verdict.

"It may be doubtful," says Mr. Starkie, "whether the doctrine of afforcement was applied to criminal cases. The account given by Bracton, as to the trial by the country on a criminal charge, is very obscure. It was to be by twelve jurors, consisting of milites or liberi et legales homines of the hundred and four villatæ."‡ But it is conjectured that the text is somewhat corrupt, and

* By the jury, the reader will remember that, in Glanvil's time, is meant the recognitors, on an assize of novel disseisin, or mort d'ancestor. For these *real* actions, now abolished, he may consult a good chapter on them in Blackstone, unless he prefer Bracton and the Year-books, digested into Reeves's History of the Law.

† In 20 E. III., Chief Justice Thorpe is said to have been reproved for taking a verdict from eleven jurors. — Law Review, No. iv. p. 383.

‡ The history of trial by jury has

that four inhabitants of the vill were to be added to the twelve jurors. In some criminal cases, it appears from Bracton, that trial by combat could not be dispensed with; because the nature of the charge did not admit of positive witnesses. "Oportet quod defendat se per corpus suum quia patria nihil scire potest de facto, nisi per præsumtionem et per auditum, vel per mandatum [?] quod quidem non sufficit ad probationem pro appellando nec pro appellato ad liberationem." This indicates, on the one hand, an advance in the appreciation of evidence since the twelfth century; common fame and mere hearsay were not held sufficient to support a charge. But on the other hand, instead of presuming the innocence of a party against whom no positive testimony could be alleged, he was preposterously called upon to prove it by combat, if the appellant was convinced enough of his guilt to demand that precarious decision. It appears clear from some passages in Bracton that, in criminal cases, other witnesses might occasionally be heard than the parties themselves. Thus, if a man were charged with stealing a horse, he says that either the prosecutor or the accused might show that it was his own, bred in his stable, known by certain marks, which could hardly be but by calling witnesses. It is not improbable that witnesses were heard distinct from the jury, in criminal cases, before the separation had been adopted in real actions.

At a later time, witnesses are directed to be joined to the inquest, but no longer as parts of it. "We find in the 23d of Edw. III." (I quote at present the words of Mr. Spence,— Equitable Jurisdiction, p. 129.), "the witnesses, instead of being summoned as constituent members, were adjoined to the recognitors or jury in assizes, to afford to the jury the benefit of their testimony, but without having any voice in the verdict. This is the first indication we have of the jury deciding on evidence for-

been very ably elucidated by Mr. Starkie, in the fourth number of the Law Review, which, though anonymous, I venture to quote by his name. I have been assisted in the text by this paper.

mally produced, and it is the connecting link between the ancient and modern jury." * But it will be remembered, what Mr. Spence certainly did not mean to doubt, that the evidence of the demandant in an assise, or writ of right, and of the prosecutor or appellant in a criminal case, had always been given in open court; and the tenant or appellee had the same right; but the latter probably was not sworn. Nor is it clear that the court would refuse other testimony if it were offered during the course of a trial. The sentence just quoted, however, appears to be substantially true; except that the words "formally produced" imply something more like the modern practice than the facts mentioned warrant. The evidence in the case reported in 23 Ass. 11. was produced to none but the jury.

Mr. Starkie has justly observed, that "the transition was now almost imperceptible to the complete separation of the witnesses from the inquest. And this step was taken at some time before the 11th of Henry IV.†; namely, that all the witnesses were to give their testimony at the bar of the court; so that the judges might exclude those incompetent by law, and direct the jury as to the weight due to the rest." "This effected a change in the modes of trying civil cases; the importance of which can hardly be too highly estimated." Jurors from being, as it were, mere recipients and depositaries of knowledge, exercised the more intellectual faculty of forming conclusions from testimony; a duty not only of high importance with

* The reference is to the Year Book, 23 Ass. 11. It was adjudged that the witnesses could not be challenged like jurors; "car ils doivent rien tesmoigner fors ceo qu'ils verront et oiront. Et l'assise fut pris, et les temoins ajoints a eux." This has no appearance of the introduction of a new custom. Above fifty years had elapsed since Bracton wrote, so that the change might have easily crept in.

† The Year Book of 11 H. IV., to which a reference seems here to be made, has not been consulted by me. But in the next year (12 H. IV. 7.) witnesses are directed to be joined to the inquest (as in 23 Ass. 11.); and one of the judges is reported to have said, this had often been done; yet we might infer that the practice was not so general as to pass without comment. This looks as if the separation of the witnesses, by their examination in open court, were not quite of so early a date as Mr. Starkie and Mr. Spence suppose. But, perhaps, both modes of procedure might be concurrent for a certain time.

a view to truth and justice, but also collaterally in encouraging habits of reflection and reasoning (aided by the instructions of the judges), which must have had a great and most beneficial effect in promoting civilisation. The exercise of the control last adverted to, on the part of the judges, was the foundation of that system of rules in regard to evidence, which has since constituted so large and important a branch of the law of England." (Spence, p. 129.)

The obscurity that hangs over the origin of our modern course of procedure before juries is far from being wholly removed. We are reduced to conjectural inferences from brief passages in early law-books, written for contemporaries, but which leave a considerable uncertainty, as the readers of this note will be too apt to discover. If we say that our actual trial by jury was established not far from the beginning of the fifteenth century, we shall perhaps approach as nearly as the diligence of late inquirers has enabled us to proceed. But in the time of Fortescue, whose treatise De Laudibus Legum Angliæ was written soon after 1450, we have the clearest proof, that the mode of procedure before juries by *vivâ voce* evidence was the same as at present. It may be presumed that the function of the advocate and of the judge to examine witnesses, and to comment on their testimony, had begun at this time. The passage in Fortescue is so full and perspicuous, that it deserves to be extracted.

"Twelve good and true men being sworn as in the manner above related, legally qualified, that is, having over and besides their moveable possessions in land sufficient (as was said) wherewith to maintain their rank and station; neither suspected by, nor at variance with either of the parties; all of the neighbourhood; there shall be read to them, in English, by the court, the record and nature of the plea, at length, which is depending between the parties; and the issue thereupon shall be plainly laid before them, concerning the truth of which those who are so sworn are to certify the court: which done, each of the parties, by themselves or their counsel, in presence

of the court, shall declare and lay open to the jury all and singular the matters and evidences whereby they think they may be able to inform the court concerning the truth of the point in question; after which each of the parties has a liberty to produce before the court all such witnesses as they please, or can get to appear on their behalf; who being charged upon their oaths shall give in evidence all that they know touching the truth of the fact concerning which the parties are at issue. And if necessity so require, the witnesses may be heard and examined apart, till they shall have deposed all that they have to give in evidence, so that what the one has declared shall not inform or induce another witness of the same side to give his evidence in the same words, or to the very same effect. The whole of the evidence being gone through, the jurors shall confer together at their pleasure, as they shall think most convenient, upon the truth of the issue before them; with as much deliberation and leisure as they can well desire, being all the while in the keeping of an officer of the court, in a place assigned them for that purpose, lest any one should attempt by indirect methods to influence them as to their opinion, which they are to give in to the court. Lastly, they are to return into court, and certify the justices upon the truth of the issue so joined, in the presence of the parties (if they please to be present), particularly the person who is plaintiff in the cause; what the jurors shall so certify in the laws of England, is called the verdict" (c. 26.).

Mr. Amos indeed has observed in his edition of Fortescue (p. 93.), "The essential alteration which has since taken place in the character of the jury, does not appear to have been thoroughly effected till the times of Edward VI. and Mary. Jurors are often called testes." But though this appellation might be retained from the usage of older times, I do not see what was left to effect in the essential character of a jury, when it had reached the stage of hearing the witnesses and counsel of the parties in open court.

The result of this investigation, suggested perhaps by

Reeves, but followed up by Sir Francis Palgrave for the earlier, and by Mr. Starkie for the later period, is to sweep away from the ancient constitution of England what has always been accounted both the pledge of its freedom, and the distinctive type of its organisation, trial by jury, in the modern sense of the word, and according to modern functions. For though the passage just quoted from Fortescue is conclusive as to his times, these were but the times of the Lancastrian kings; and we have been wont to talk of Alfred, or at least of the Anglo-Saxon age, when the verdict of twelve-sworn men was the theme of our praise. We have seen that, during this age, neither in civil nor in criminal proceedings, it is possible to trace this safeguard for judicial purity. Even when juries may be said to have existed in name, the institution denoted but a small share of political wisdom, or at least provided but indifferently for impartial justice. The mode of trial by witnesses returned on the panel, hearing no evidence beyond their own in open court, unassisted by the sifting acuteness of lawyers, laid open a broad inlet for credulity and prejudice, for injustice and corruption. Perjury was the dominant crime of the middle ages; encouraged by the preposterous rules of compurgation, and by the multiplicity of oaths in the ecclesiastical law. It was the frequency of this offence, and the impunity which the established procedure gave to that of jurors, that produced the remedy by writ of attaint; but one which was liable to the same danger; since the jury on an attaint must, in the early period of that process, have judged on common fame, or on their own testimony, like those whose verdict they were called to revise; and where hearsay and tradition passed for evidence, it must, according to our stricter notions of penal law, have been very difficult to obtain an equitable conviction of the first panel on the ground of perjury.

The Chronicle, already quoted, by Jocelyn de Brakelonde, affords an instance, among multitudes, probably, that are unrecorded, where a jury flagrantly violated their duty. Five recognitors, in a writ of assise, came

to Samson, Abbot of St. Edmund's Bury, the Chronicler's hero, the right of presentation to a church being the question, in order to learn from him what they should swear, meaning to receive money. He promised them nothing, but bade them swear according to their consciences. They went away in wrath, and found a verdict against the abbey.* (P. 44.)

Yet in its rudest and most imperfect form, the trial by a sworn inquest was far superior to the impious superstition of ordeals, the hardly less preposterous and unequal duel, the unjust deference to power in compurgation, when the oath of one thane counterbalanced those of six ceorls, and even to the free-spirited but tumultuary and unenlightened decisions of the hundred or the county. It may, indeed, be thought by the speculative philosopher, or the practical lawyer, that in those early stages which we have just been surveying, from the introduction of trial by jury under Henry II. to the attainment of its actual perfection in the first part of the fifteenth century, there was little to warrant our admiration. Still let us ever remember, that we judge of past ages by an erroneous standard, when we wonder at their prejudices, much more when we forget our own. We have but to place ourselves, for a few

* I may set down here one or two other passages from the same chronicle, illustrating the modes of trial in that age. Samson offered that a right of advowson should be determined by the claimant's oath, 'a method recognised by the civil and canon law, and preserved, to a certain extent, by our courts of equity. "Cumque miles ille renuisset jurare, dilatum est juramentum per consensum utriusque partis sexdecim legalibus de hundredo, qui juraverunt hoc esse jus abbatis." (p. 44.) The proceeding by jurors was sometimes applied even when the sentence belonged to the ecclesiastical jurisdiction. A riot, with bloodshed, having occurred, the abbot, acceptis juramentis a sexdecim legalibus hominibus, et auditis eorum attestationibus, pronounced sentence of excommunication against the offenders.

The combat was not an authorised mode of trial within boroughs; they preserved the old Saxon compurgation. And this may be an additional proof of the antiquity of their privileges. A free tenant of the *celerarius* of the abbey, "cui potûs et escæ cura" (Ducange), being charged with robbery, and vanquished in the combat, was hanged. The burgesses of Bury said, that if he had been resident within the borough, it would not have come to battle, but he would have purged himself by the oaths of his neighbours, "sicut libertas est eorum qui manent infra burgum" (p. 74.). It is hard to pronounce by which procedure the greater number of guilty persons escaped.

minutes, in imagination among the English of the twelfth and thirteenth centuries, and we may better understand why they cherished and panted for the *judicium parium*, the trial by their peers, or, as it is emphatically styled, by the country. It stood in opposition to foreign lawyers and foreign law; to the chicane and subtlety, the dilatory and expensive, though accurate, technicalities of Normandy, to tribunals where their good name could not stand them in stead, nor the tradition of their neighbours support their claim: For the sake of these, for the maintenance of the laws of Edward the Confessor, as in pious reverence they termed every Anglo-Saxon usage, they were willing to encounter the noisy rudeness of the county-court, and the sway of a potent adversary.

Henry II., a prince not perhaps himself wise, but served by wise counsellors, blended the two schemes of jurisprudence, as far as the times would permit, by the assise of novel disseisin, and the circuits of his justices in eyre. From this age we justly date our form of civil procedure, the trial by a jury (using always that word in a less strict sense than it bears with us), replaced that by the body of hundredors; the stream of justice purified itself in successive generations, through the acuteness, learning, and integrity of that remarkable series of men, whose memory lives chiefly among lawyers, I mean the judges under the house of Plantagenet; and thus, while the common law borrowed from Normandy too much, perhaps, of its subtlety in distinction, and became as scientific as that of Rome, it maintained, without encroachment, the grand principle of the Saxon polity, the trial of facts by the country. From this principle (except as to that preposterous relic of barbarism, the requirement of unanimity) may we never swerve—may we never be compelled, in wish, to swerve—by a contempt of their oaths in jurors, and a disregard of the just limits of their trust!

139.

FRANK PLEDGE.

Edit. 1826, vol. ii. p. 403. Edit. 1841, vol. ii. p. 78.

SIR F. PALGRAVE, who does not admit the application of some of the laws cited in the text, says: — "At some period, towards the close of the Anglo-Saxon monarchy, the freepledge was certainly established in the greater part of Wessex and Mercia, though, even there, some special exceptions existed. The system was developed between the accession of Canute and the demise of the Conqueror: — and it is not improbable but that the Normans completed what the Danes had begun." (Vol. ii. p. 123.)

It is very remarkable, that there is no appearance of the frank pledge in that part of England which had formed the kingdom of Northumberland. (Vol. i. p. 202.) This indeed contradicts a passage, quoted in the text from the laws of Edward the Confessor, which Sir F. P. suspects to be interpolated. But we find a presentment by the county of Westmoreland in 20 Ed. I.: — "Comitatus recordatur quod nulla Englescheria presentatur in comitatu isto, nec murdrum, nec est aliqua decenna nec visus francplegii nec manupastus in comitatu isto, nec unquam fuit in partibus borealibus citra Trentam." (Ibidem.) "It is impossible to speak positively to a negative proposition; and in the vast mass of these most valuable records, all of which are still unindexed, some entry relating to the collective frank pledge may be concealed. Yet from their general tenor, I doubt whether any will be discovered." The immense knowledge of records possessed by Sir F. P. gives the highest weight to his judgment.

140.

BOCLAND AND FOLCLAND.

Edit. 1826, vol. ii. p. 409. Edit. 1841, vol. ii. p. 83.

IT is impossible to support any longer the account of folcland given in the text. The nature of both tenures has been perspicuously illustrated by Mr. Allen, in his Inquiry into the Rise and Growth of the Royal Prerogative, from which I shall make a long extract.

"The distribution of landed property in England by the Anglo-Saxons, appears to have been regulated on the same principles that directed their brethren on the Continent. Part of the lands they acquired was converted into estates of inheritance for individuals; part remained the property of the public, and was left to the disposal of the state. The former was called *bocland;* the latter I apprehend to have been that description of landed property, which was known by the name of *folcland.*

"Folcland, as the word imports, was the land of the folk, or people. It was the property of the community. It might be occupied in common, or possessed in severalty; and, in the latter case, it was probably parcelled out to individuals in the *folcgemot*, or court of the district, and the grant attested by the freemen who were then present. But, while it continued to be folcland, it could not be alienated in perpetuity; and, therefore, on the expiration of the term for which it had been granted, it reverted to the community, and was again distributed by the same authority.*

* Spelman describes folcland as "terra popularis, quæ jure communi possidetur—sine scripto." (Gloss. Folcland.) In another place he distinguishes it accurately from bocland:—"Prædia Saxones duplici titulo possidebant: vel scripti auctoritate, quod bocland vocabant — vel populi testimonio, quod folcland dixere." (Ib. Bocland.)

Bocland was held by book or charter. It was land that had been severed by an act of government from the folcland, and converted into an estate of perpetual inheritance. It might belong to the church, to the king, or to a subject. It might be alienable, and devisable, at the will of the proprietor. It might be limited in its descent, without any power of alienation in the possessor. It was often granted for a single life, or for more lives than one, with remainder in perpetuity to the church. It was forfeited for various delinquencies to the state.

Estates in perpetuity were usually created by charter after the introduction of writing, and, on that account, bocland and land of inheritance are often used as synonymous expressions. But at an earlier period they were conferred by the delivery of a staff, a spear, an arrow, a drinking horn, the branch of a tree, or a piece of turf; and when the donation was in favour of the church, these symbolical representations of the grant were deposited with solemnity on the altar; nor was this practice entirely laid aside after the introduction of title-deeds. There are instances of it as late as the time of the Conqueror. It is not, therefore, quite correct to say, that all the lands of the Anglo-Saxons were either folcland or bocland. When land was granted in perpetuity it ceased to be folcland; but it could not with propriety be termed bocland, unless it was conveyed by a written instrument.

Folcland was subject to many burthens and exactions from which bocland was exempt. The possessors of folcland were bound to assist in the reparation of royal vills and in other public works. They were liable to have travellers and others quartered on them for subsistence. They were required to give hospitality to kings and great men in their progresses through the country, to furnish them with carriages and relays of horses, and to extend the same assistance to their messengers, followers, and servants, and even to the persons who had charge of their hawks, horses, and hounds. Such at least are the burthens from which lands are liberated, when converted by charter into bocland.

Bocland was liable to none of these exactions. It was released from all services to the public, with the exception of contributing to military expeditions, and to the reparation of castles and bridges. These duties or services were comprised in the phrase of *trinoda necessitas*, which were said to be incumbent on all persons, so that none could be excused from them. The Church indeed contrived, in some cases, to obtain an exemption from them; but in general its lands, like those of others, were subject to them. Some of the charters granting to the possessions of the Church an exemption from all services whatsoever, were genuine; but the greater part are forgeries" (p. 142.).

Bocland, we perceive by this extract, was not necessarily alodial, in the sense of absolute propriety. It might be granted for lives, as was often the case; and then it seems to have been called *læn-land* (præstita), lent or leased. (Palgrave, ii. 361.) Such land, however, was not feudal, as I conceive, if we use that word in its legitimate European sense; though *lehn* is the only German word for a fief. Mr. Allen has found no traces of this use of the word among the Anglo-Saxons. (Appendix, p. 57.) Sir F. Palgrave agrees in general with Mr. Allen.*

We find another great living authority on Anglo-Saxon and Teutonic law concurring in the same luminous solution of this long-disputed problem. "The natural origin of folcland is the superabundance of good land above what was at once appropriated by the tribes, families, or gentes (mægburg, gelondân), who first settled in a waste or conquered land; but its existence enters into and modifies the system of law, and on it depends the definition of the march and the gau with their boundaries. Over the folcland at first the king alone had no controul; it must have been apportioned by the nation in its solemn meeting; earlier, by the shire or other collection of freemen. In

* The law of real property, or bocland, in the Anglo-Saxon period, is given in a few pages, equally succinct and luminous, by Mr. Spence. Equit. Jurisd. pp. 20—25. The Codex Diplomaticus furnishes the best ancient precedents, and is of course studied, to the disregard, where necessary, of more defective authorities, by those who regard this portion of legal history.

Beôwulf, the king determines to build a palace, and distribute in it to his comites, such gold, silver, arms, and other valuables as God had given him, save the folcsceare and the lives of men—"bûtan folcsceare and feorum gumena"—which he had no authority to dispose of. This relative position of folcland to bocland is not confined to the Anglo-Saxon institutions. The Frisians, a race from whom we took more than has generally been recognised, had the same distinction. At the same time I differ from Grimm, who seems to consider folcland as the pure alod, bôcland as the fief. "Folcland, im gegensatz zu beneficium. Leges Edv. II; das ist, reine alod, im gegensatz zu beneficium, lehen. Vgl. das friesische câplond und bôcland. As. p. 15." (D. R. A. p. 493.) I think the reverse is the case; and indeed we have one instance where a king exchanged a certain portion of folcland for an equal portion of bôcland with one of his comites. He then gave the exchanged folcland all the privileges of bôcland, and proceeded to make the bôcland he had receîved in exchange, *folcland.*" (Kemble's Codex Diplomaticus, i. p. 104.)

It is of importance to mention that Mr. K., when he wrote this passage, had not seen Mr. Allen's work*; so that the independent concurrence of two such antiquaries in the same theory lends it very great support. In the second volume of the "Codex Diplomaticus," the editor adduces fresh evidence as to the nature of folcland, "the *terra fiscalis*, or public land grantable by the king or his council, as the representatives of the nation" (p. 9.). Mr. Thorpe, in the glossary to his edition of "Ancient Laws" (v. Folcland), quotes part of the same extract from Allen which I have given, and making no remark, must be understood to concur in it. Thus we may consider this interpretation in possession of the field.†

The word folcland fell by degrees into disuse, and gave

* Vol. ii. p. 20.

† It seems to be a necessary inference from the evidence of Domesday Book, that all England had been converted into bocland before the Conquest, with the exception of the terra regis, if that were truly the representative of ancient folcland, as Allen supposes.

place to the term *terra regis;* or crown land. (Allen, p. 160.) This indicates the growth of a monarchical theory which reached its climax, in this application of it, after the Conquest, when the entire land of England was supposed to have been the demesne land of the king, held under him by a feudal tenure.

141.

ANGLO-SAXON USE OF THE WORD VASSALLUS.

Edit. 1826, vol. ii. p. 413. Edit. 1841, vol. ii. p. 86.

THE word *vassallus* occurs not only in the suspicious charter of Cenulf, quoted in a subsequent note, but in one of 952 (Codex Diplomat. ii. 303.), to which I was led by Mr. Spence (Equitable Jurisdiction, p. 44.), who quotes another from p. 323., which is probably a misprint; but I have found one of Edgar, in 967. (Codex Diplomat. iii. 11.) I think that Mr. Spence, in the ninth and tenth chapters of his learned work, has too much blended the Anglo-Saxon *man* of a lord with the continental vassal; which is a *petitio principii.* Certainly the word was of rare use in England; and the authenticity of Asserius, whom I have quoted as a contemporary biographer of Alfred, which is the common opinion, has been called in question by Mr. Wright, who refers that Life to the age of the Conquest. (Archæologia, vol. xxix.)

142.

TERRITORIAL JURISDICTION.

Edit. 1826, vol. ii. p. 417. Edit. 1841, vol. ii. p. 88.

MR. KEMBLE is of opinion that the words granting territorial jurisdiction do not occur in any genuine charter before the Confessor. (Codex Diplom. i. 43.) They are of constant occurrence in those of the first Norman reigns.

But the Normans did not understand them, and the words are often misspelled. He thinks, therefore, that the rights were older than the Conquest, and accounts for the rare mention of them by the somewhat unsatisfactory supposition that they were so inherent in the possession of land as not to require particular notice. (See Spence, Equit. Juris. pp. 64. 68.)

143.

FEUDAL TENURES.

Edit. 1826, vol. ii. p. 418. Edit. 1841, vol. ii. p. 89.

IT will probably be never disputed again that lands were granted by a military tenure before the Conquest. Thus, besides the proofs in the text, in the laws of Canute, (c. 78.):—"And the man who shall flee from his lord or from his comrade by reason of his cowardice, be it in the shipfyrd, be it in the landfyrd, let him forfeit all he owns, and his own life; and let the lord seize his possessions, and his land which he previously gave him; and if he have bôcland, let that go into the king's hands." (Ancient Laws, p. 180.) And we read of lands called *hlafordsgifu*, lord's gift. (Leges Ethelred I., Ancient Laws, p. 125.) But these were not always feudal, or even hereditary; they were, what was called on the Continent, præstariæ, granted for life or for a certain term; and this, as has been observed above, seems to be the proper meaning of the term læn-lands.

But the general tenure of lands was still allodial. "Taini lex est," says a curious document on the rights, that is, obligations, of different ranks, published by Mr. Thorpe, —"ut sit dignus rectitudine testamenti sui (*his boc-rightes wyrthe*, that is, perhaps, bound to the duties implied by the deed which creates his estates),—et ut ita faciat pro terrâ suâ, scilicet expeditionem *burhbotam* et *brighotam*. Et de multis terris majus *landirectum* exsurgit ad bannum regis," &c. (p. 185.) Here we find the well-known *tri-*

noda necessitas of alodial land, with other contingent liabilities imposed by grant or usage.*

We may probably not err very much in supposing that the state of tenures in England under Canute or the Confessor, was a good deal like those in France under Charlemagne or Charles the Bald,—an alodial trunk with numerous branches of feudal benefice grafted into it. But the conversion of the one mode of tenure into the other, so frequent in France, does not appear to have prevailed on this side of the channel.

I will only add here, that Mr. Spence, an authority of great weight, maintains a more complete establishment of the feudal polity before the Conquest than I have done. (p. 48.) This is a subject on which it is hard to lay down a definite line. But I must protest against my learned friend's derivation of the feudal system from "the aristocratic principle that prevailed in the Roman dominions while the republic endured, and which was incorporated with the principles of despotism introduced during the empire." It is because the aristocratic principle could not be incorporated with that of despotism, that I conceive the feudal system to have been incapable of development, whatever inchoate rudiments of it may be traced, until a powerful territorial aristocracy had rendered despotism no longer possible.

* Mr. Kemble has printed a charter of Cenulf, king of Mercia, to the abbey of Abingdon, in 820, without the asterisk of spuriousness (Codex Diplom. i. 269.); and it is quoted by Sir F. Palgrave (vol. i. p. 159.) in proof of military tenures. The expression, however, expeditionem cum duodecim *vassallis*, et totidem *scutis* exerceant, seems not a little against its authenticity. The former has observed, that the testamentary documents before the Conquest, made by men who were under a superior lord, contain a clause of great interest; namely, an earnest prayer to the lord that he will permit the will to stand according to the disposition of the testator, coupled not unfrequently with a legacy to him on condition of his so doing, or to some person of influence about him for intercession on the testator's behalf. And hence he infers that, "as no man supplicates for that which he is of his own right entitled to enjoy, it appears as if these great vassals of the crown had not the power of disposing of their lands and chattels but as the king might permit; and, in the strict construction of the bond between the king and them, all that they gained in his service must be taken to fall into his hands after their death." (Introduction to Cod. Dip. p. 111.) This inference seems hardly borne out by the premises: a man might sometimes be reduced to supplicate a superior for that which he had a right to enjoy.

144.

ARMY OF WILLIAM.

Edit. 1826, vol. ii. p. 420. Edit. 1841, vol. ii. p. 91.

IT has been suggested, in the second Report of a Committee of the Lords' House on the Dignity of a Peer, to which I shall have much recourse in the following pages*, that "the facility with which the Conquest had been achieved seems to have been, in part, the consequence of defects in the Saxon institutions, and of the want of a military force similar to that which had then been established in Normandy, and in some other parts of the continent of Europe. The adventurers in the army of William were of those countries in which such a military establishment had prevailed" (p. 24.). It cannot be said, I think, that there were any manifest defects in the Saxon institutions, so far as related to the defence of the country against invasion. It was part of the *trinoda necessitas*, to which all alodial landholders were bound. Nor is it quite accurate to speak of a military force then established in Normandy, or any where else. We apply these words to a permanent body always under arms. This was no attribute of feudal tenure, however the frequency of war, general or private, may have enured the tenants by mili-

* This report I generally quote from that printed in 1819; but in 1829 it was reprinted with corrections. It has been said that these were occasioned by the strictures of Mr. Allen, in the 35th volume of the Edinburgh Review, not more remarkable for their learning and acuteness, than their severity on the Report. The corrections, I apprehend, are chiefly confined to errors of names, dates, and others of a similar kind, which no doubt had been copiously pointed out. But it has not appeared to me that the Lords' Committee have altered, in any considerable degree, the positions upon which the reviewer animadverts. It was hardly, indeed, to be expected, that the supposed compiler of the Report, the late Lord Redesdale, having taken up his own line of opinion, would abandon it on the suggestions of one whose comments, though extremely able, and often, in the eyes of many, well-founded, are certainly not couched in the most conciliatory or respectful language.

tary service to a more habitual discipline than the thanes of England ever knew. The adventurers in William's army were from various countries, and most of them, doubtless, had served before, but whether as hired mercenaries or no, we have probably not sufficient means of determining. The practice of hiring troops does not attract the notice of historians, I believe, in so early an age. We need not, however, resort to this conjecture, since history sufficiently explains the success of William.

145.

RISINGS OF THE ENGLISH.

Edit. 1826, vol. ii. p. 422. Edit. 1841, vol. ii. p. 92.

THE brave resistance of Hereward in the fens of Lincoln and Cambridge is well told by M. Thierry, from Ingulfus and Gaimar. (Conquête d'Anglet. par les Normands, vol. ii. p. 168.) Turner had given it in some detail from the former. Hereward ultimately made his peace with William, and recovered his estate. According to Ingulfus he died peaceably, and was buried at Croyland; according to Gaimar, he was assassinated in his house by some Normans. The latter account is confirmed by an early chronicler, from whom an extract is given by Mr. Wright. A more detailed memoir of Hereward (De Gestis Herwardi Saxonis) is found in the chartulary of Swaffham Abbey, now preserved in Peterborough cathedral, and said to be as old as the twelfth century. Mr. Wright published it in 1838, from a copy in the library of Trinity College, Cambridge. If the author is to be believed, he had conversed with some companions of Hereward. But such testimony is often feigned by the mediæval semi-romancers. Though the writer appears to affect a different origin, he is too full of Anglo-Saxon sympathies to be disguised; and, in fact, he has evidently borrowed greatly from exaggerated legends, perhaps metrical, current among

the English, as to the early life of Hereward, to which Ingulfus, or whoever personated him, cursorily alludes.

146.

GREGORY VII. IN THE PAPAL CHAIR.

Edit. 1826, vol. ii. p. 423. Edit. 1841, vol. ii. p. 92.

THIS is very inadvertently written; for, in the first place, not Gregory VII., but Alexander II., was pope in 1070, when Stigand and his Anglo-Saxon brethren were deposed; and secondly, it was done with the concurrence and sanction of that pope, so that the stretch of power was by Rome rather than by William. It must pass for a gross violation of ecclesiastical as well as of national rights, and Lanfranc cannot be reckoned, notwithstanding his distinguished name, as any better than an intrusive bishop. He showed his arrogant scorn of the English nation in another and rather a singular manner. They were excessively proud of their national saints, some of whom were little known, and whose barbarous names disgusted Italian ears.* The Norman bishops, and the primate especially, set themselves to disparage, and in fact to dispossess, St. Aldhelm, St. Elfig, and, for aught we know, St. Swithin, St. Werburg, St. Ebb, and St. Alphage: names, it must be owned—

"That would have made Quintilian stare and gasp."

We may judge what the eminent native of Pavia thought of such a hagiology. The English Church found herself, as it were, with an attainted peerage. But the calendar withstood these innovations.

Mr. Turner, in his usual spirit of panegyric, says: — "He (William) made important changes among the

* "Angli inter quos vivimus," said the foreign priests, "quosdam sibi instituerunt sanctos, quorum incerta sunt merita." This might be true enough; but the same measure should have been meted to others. — Thierry, vol. ii. p. 158. edit. 1830.

English clergy; he caused Stigand and others to be deposed, and he filled their places with men from Normandy and France, who were distinguished by the characters of piety, decorous morals, and a love of literature. This measure was an important addition to the civilisation of the island," &c. (Hist. of England, vol. i. p. 104.) Admitting this to be partly true, though he would have found by no means so favourable an account of the Norman prelates in Ordericus Vitalis, if he had read a few pages beyond the passages to which he refers, is it consonant to historical justice that a violent act, like the deposition of almost all the Anglo-Saxon hierarchy, should be spoken of in a tone of praise, which the whole tenour of the paragraph conveys?

147.

REJECTION OF THE ENGLISH LANGUAGE.

Edit. 1826, vol. ii. p. 423. Edit. 1841, vol. ii. p. 92.

THE passage in Ingulfus, quoted in support of this position *, has been placed by Sir F. Palgrave among the proofs that we have a forgery of the fourteenth century in that historian, the facts being in absolute contradiction to him. "Before the reign of Henry III., we cannot discover a deed or law drawn or composed in French. Instead of prohibiting the English language, it was employed by the Conqueror and his successors in their charters until the reign of Henry II., when it was superseded not by the French, but by the Latin language, which had been gradually gaining or rather regaining ground." (Edinb. Rev. xxxiv. 262.) "The Latin language had given way

* If I have rightly translated, in the text of Ingulfus, leges *tractarentur* by *administered*, the falsehood is manifest; since the laws were administered in the county and hundred courts, and certainly not there in French. I really do not perceive how this passage could have been written by Ingulfus, who must have known the truth; at all events, his testimony must be worth little on any subject, if he could so palpably misrepresent a matter of public notoriety. The supposition of entire forgery is one which we should not admit without full proof; but, in this instance, there are perhaps fewer difficulties on this side than on that of authenticity.

in a great measure, from the time of Canute, to the vernacular Anglo-Saxon. Several charters in the latter language occur before; but for fifty years ending with the Conquest, out of 254 (published in the fourth volume of the Codex Diplomaticus,) 137 are in Anglo-Saxon, and only 117 in Latin." (Kemble's Preface, p. 6.)

148.

DOMESDAY BOOK.

Edit. 1826, vol. ii. p. 425. Edit. 1841, vol. ii. p. 94.

"THE regularity of the course adopted when this record was compiled, is very remarkable; and affords a satisfactory proof that the business of the government was well conducted, and with much less rudeness than is usually supposed. The commissioners were furnished with interrogatories, upon which they examined the jurors of the shire and hundred, and also such other witnesses as they thought expedient.

"Hic subscribitur inquisicio terrarum quomodo Barones Regis inquirunt, videlicet, per sacramentum vicecomitis Sciræ et omnium Baronum et eorum Francigenarum et tocius centuriatus — presbiteri præpositi VI villani uniuscujusque villæ [sic]. — Deinde quomodo vocatur mansio, quis tenuit eam tempore Regis *Edwardi*, quis modo tenet, quot hidæ, quot carrucatæ in dominio, quot homines, quot villani, quot cotarii, quot servi, quot liberi homines, quot sochemanni, quantum silvæ, quantum prati, quot pascuorum, quot molendinæ, quot piscinæ, quantum est additum vel ablatum, quantum valebat totum simul; et quantum modo; quantum ibi quisque liber homo vel sochemanus habuit vel habet. Hoc totum tripliciter, scilicet tempore Regis *Ædwardi*; et quando Rex *Willielmus* dedit; et quomodo sit modo, et si plus potest haberi quam habeatur. Isti homines juraverunt (then follow the names). (Inquisitio Eliensis, p. 497.)" Palgrave, ii. 444.

The valuable labours of Sir Henry Ellis, in presenting us with a complete analysis of Domesday Book, afford an opportunity, by his list of mesne tenants at the time of the survey, to form some approximation to the relative numbers of English and foreigners holding manors under the immediate vassals of the crown. The baptismal names (there are rarely any others) are not always conclusive; but, on the whole, we learn by a little practice to distinguish the Norman from the Anglo-Saxon. It would be manifest, by running the eye over some pages of this list, how considerably I have been mistaken in the supposition, one very far indeed from peculiar to myself, that few of English birth held entire manors; though I will not now affirm or deny that they were a majority, they form a large proportion of nearly 8000 *mesne* tenants *, who are summed up by the diligence of Sir Henry Ellis. And we may presume that they were in a very much greater proportion among the "liberi homines," who held lands, subject only to free services, seldom or never very burthensome. It may be added that many Normans, as we learn from history, married English heiresses, rendered so frequently, no doubt, by the violent deaths of their fathers and brothers, but still transmitting ancient rights, as well as native blood, to their posterity. If we consider these things, great as the spoliation must appear in modern times, and almost completely as the nation was excluded from civil power in the commonwealth, we shall hardly go along with modern writers, who represent them as universally reduced to a state of penury and servitude. The vast extent of the Norman estates in capite is apt to deceive us. In reading of a baron who held forty or fifty or one hundred manors, we are prone to fancy his wealth something like what a similar estate would produce at this day. But if we look at the next words, we shall continually find that some one else held of him; and this was a holding by knight's service, subject to feudal incidents

* Ellis's Introduction to Domesday, vol. ii. p. 811. "The tenants in capite, including ecclesiastical corporations, amounted scarcely to 1400; the undertenants were 7871."

no doubt, but not leaving the seigniory very lucrative, or giving any right of possessory ownership over the land. The real possessions of the tenant of a manor, whether holding in chief or not, consisted in the demesne lands, the produce of which he obtained without cost by the labour of the villeins, and in whatever other payments they might be bound to make in money or kind. It will be remembered, what has been more than once inculcated, that at this time the villani and bordarii, that is, ceorls, were not like the villeins of Bracton and Littleton, destitute of rights in their property; their condition was tending to the lower stage, and with a Norman lord they were in much danger of oppression; but they were "law worthy," they had a civil *status* (to pass from one technical style to another), for a century after the Conquest.

Yet I would not extenuate the calamities of this great revolution, true though it be that much good was brought out of them, and that we owe no trifling part of what inspires self-esteem to the Norman element of our population and our polity. England passed under the yoke; she endured the arrogance of foreign conquerors; her children, even though their loss in revenue may have been exaggerated, and still it was enormous, became a lower race, not called to the councils of their sovereign, not sharing his trust or his bounty. They were in a far different condition from the provincial Romans after the conquest of Gaul, even if, which is hardly possible to determine, their actual deprivation of lands should have been less extensive. For not only they did not for several reigns occupy the honourable stations which sometimes fell to the lot of the Roman subject of Clovis or Alaric, but they had a great deal more freedom and importance to lose. Nor had they a protecting Church to mitigate barbarous superiority; their bishops were degraded and in exile; the footstep of the invader was at their altars; their monasteries were plundered, and the native monks insulted. Rome herself looked with little favour on a Church which had preserved some measure of independence.

Strange contrast to the triumphant episcopate of the Merovingian kings!

The oppression of the English during the first reigns after the Conquest is fully described by the Norman historians themselves, as well as by the Saxon chronicle. Their testimonies are well collected by M. Thierry, in the second volume of his valuable history.

149.

FOREST LAW.

Edit. 1826, vol. ii. p. 426. Edit. 1841, vol. ii. p. 97.

M. THIERRY conjectures that these severe regulations had a deeper motive than the mere preservation of game, and were intended to prevent the English from assembling in arms on pretence of the chase. (Vol. ii. p. 257.) But perhaps this is not necessary. We know that a disproportionate severity has often guarded the beasts and birds of chase from depredation.

Allen admits (Edinburgh Rev. xxvi, 355.) that the forest laws seem to have been enacted by the king's sole authority; or, as we may rather say, that they were considered as a part of his prærogative. The royal forests were protected by extraordinary penalties even before the Conquest. "The royal forests were part of the demesne of the crown. They were not included in the territorial divisions of the kingdom, civil or ecclesiastical, nor governed by the ordinary courts of law, but were set apart for the recreation and diversion of the king, as waste lands, which he might use and dispose of at pleasure." "Forestæ" says Sir Henry Spelman, "nec villas propriè accepere, nec parochias, nec de corpore alicujus comitatûs vel episcopatûs habitæ sunt, sed extraneum quiddam et feris datum, ferino jure, non civili, non municipali fruebantur; regem in omnibus agnoscentes dominum unicum et ex arbitrio disponentem." Mr. Allen quotes afterwards a passage from the "Dialogus de Scaccario," which in-

dicates the peculiarity of the forest laws. "Forestarum ratio, pœna quoque vel absolutio delinquentium in eas, sive pecuniaria fuerit sive corporalis, seorsim ab aliis regni judiciis secernitur, et solius regis arbitrio, vel cujuslibet familiaris ad hoc specialiter deputati subjicitur. Legibus quidem propriis subsistit; quas non communi regni jure, sed voluntaria principum institutione subnixas dicunt." The forests were, to use a word in rather an opposite sense to the usual, an oasis of despotism in the midst of the old common law.

150.

OATH OF FEALTY.

Edit. 1826, vol. ii. p. 430. Edit. 1841, vol. ii. p. 97.

THE oath of allegiance or fealty, for they were in spirit the same, had been due to the king before the Conquest; we find it among the laws of Edmund. (Allen's Inquiry, p. 68.) It was not, therefore, likely that William would surrender such a tie upon his subjects. But it had also been usual in France under Charlemagne, and perhaps later.

151.

JURISDICTION OF FEUDAL COURTS.

Edit. 1826, vol. ii. p. 434. Edit. 1841, vol. ii. p. 100.

THIS is put too low in the text, and is better stated afterwards, p. 462 (p. 119.). The feudal courts, if under that name we include those of landholders having grants of soc, sac, infangthef, &c., from the crown, had originally a jurisdiction exclusive of the county and hundred. The laws of Henry I., a treatise of great authority as a contemporary exposition of the law of England in the middle of the twelfth century, just before the great though silent revolution which brought in the Norman jurispru-

dence, bear abundant witness to the territorial courts, collateral to, and independent of those of the sheriff. Other proofs are easily furnished for a later period. (Vide Chron. Jocelyn de Brakelonde, *et alia.*) In reality many of these jurisdictions, especially for criminal procedure, exist still, or did so till late years. It is, however, true, and should be observed, that a writ of right, that is, a claim of lands within a manor, might be removed by a writ called *tolt* from the manerial to the county court, as a personal action might by another, called *pone*, into that of the king. I do not know when the *tolt* was introduced; it must have greatly impaired the territorial jurisdiction; and, as it enhanced that of the county court, it came in perhaps while the recollection of Anglo-Saxon theories was not effaced. From this time the statement in the text is much nearer the truth than when it is put so absolutely as I had done.

152.

LEGISLATIVE POWER IN ANGLO-NORMAN REIGNS.

Edit. 1826, vol. ii. p. 442. Edit. 1841, vol. ii. p. 105.

"AMONGST the prerogatives of the crown, the Conqueror and many of his successors appear to have assumed the power of making laws to a certain extent, without the authority of their greater council, especially when operating only in restraint of the king's prerogative, for the benefit of his subjects, or explaining, amending, or adding to the existing law of the land, as administered between subject and subject; and this prerogative was commonly exercised with the advice of the king's ordinary or select council, though frequently the edict was expressed in the king's name alone. But as far as can be judged from existing documents or from history, it was generally conceived that beyond these limits the consent of a larger assembly, of that which was deemed the 'Commune concilium regni,' was in strictness necessary; though

sometimes the monarch on the throne ventured to stretch his prerogative farther, even to the imposition of taxes to answer his necessities, without the common consent; and the great struggles between the kings of England and their people have generally been produced by such stretches of the royal prerogative, till at length it has been established, that no legislative act can be done without the concurrence of that assembly, now emphatically called the king's parliament." (Report of Lords' Committee on the Dignity of a Peer, p. 22. edit. 1819.).

"It appears," say the committee afterwards, "from all the charters taken together, that during the reigns of William Rufus, his brother Henry, and Stephen, many things had been done contrary to law; but that there did exist some legal constitution of government, of which a legislative council (for some purposes at least) formed a part; and particularly that all impositions and exactions by the mere authority of the Crown, not warranted by the existing law, were reprobated as infringements of the just rights of the subjects of the realm, though the existing law left a large portion of the king's subjects liable to tallage imposed at the will of the Crown; and the tenants of the mesne lords were in many cases exposed to similar exaction." (p. 42.)

These passages appeared to Mr. Allen so inadequate a representation of the Anglo-Norman constitution, that he commented upon the ignorance of the committee with no slight severity in the Edinburgh Review. The principal charges against the Report in this respect are, that the committee have confounded the ordinary or select council of the king with the *commune concilium*, and supposed that the former alone was intended by historians, as the advisers of the crown in its prerogatives of altering the law of the land, when, in fact, the great council of the national aristocracy is clearly pointed out; and that they have disregarded a great deal of historical testimony to the political importance of the latter. It appears to be clearly shown from the Saxon Chronicle and other writers, that assemblies of bishops and nobles, sometimes

very large, were held by custom, "de more," three times in the year, by William the Conqueror and by both his sons; that they were, however, gradually intermitted by Henry I., and ceased early in the reign of Stephen. In these councils, which were legislative so far as new statutes were ever required, a matter of somewhat rare occurrence, but more frequently rendering their advice on measures to be adopted, or their judgment in criminal charges against men of high rank, and even in civil litigation, we have, at least in theory, the acknowledged limitations of royal authority. I refer the reader to this article in the Edinburgh Review (vol. xxxv.); to which we must generally assent; observing, however, that the committee, though in all probability mistaken in ascribing proceedings of the Norman sovereigns to the advice of a select council, which really emanated from one much larger, did not call in question, but positively assert the constitutional necessity of the latter for general taxation, and perhaps for legislative enactments of an important kind. And, when we consider the improbability that "all the great men over all England, archbishops and bishops, abbots and earls, thanes and knights," as the Saxon chronicler pretends, could have been regularly present thrice a year, at Winchester, Westminster, and Gloucester, when William, as he informs us, "wore his crown," we may well suspect that, in the ordinary exercise of his prerogative, and even in such provisions as might appear to him necessary, he did not wait for a very full assembly of his tenants-in-chief. The main question is, whether this council of advice and assent was altogether of his own nomination, and this we may confidently deny.

The custom of the Anglo-Saxon kings had been to hold meetings of their witan very frequently, at least in the regular course of their Government. And this was also the rule in the grand fiefs of France. The pomp of their court, the maintenance of loyal respect, the power of keeping a vigilant eye over the behaviour of the chief men, were sufficient motives for the Norman kings to preserve this custom; and the nobility of course saw in it the security

of their privileges, as well as the exhibition of their importance. Hence we find that William and his sons held their courts *de more*, as a regular usage, three times a year, and generally at the great festivals, and in different parts of the kingdom. Instances are collected by the Edinburgh Reviewer, (vol. xxxv. p. 5.) And here the public business was transacted; though, if these meetings were so frequent, it is probable that for the most part they passed off in a banquet or a tournament.

The Lords' Committee, in notes on the Second Report, when reprinted in 1829, do not acquiesce in the positions of their hardy critic, to whom, without direct mention, they manifestly allude. "From the relations of annalists and historians," they observe, "it has been inferred that during the reign of the Conqueror, and during a long course of time from the Conquest, the archbishops, bishops, abbots and priors, earls and barons of the realm were regularly convened three times in every year, at three different and distinct places in the kingdom, to a general council of the realm. Considering the state of the country, and the habits and dispositions of the people, this seems highly improbable; especially if the word barones, or the words proceres or magnates, often used by writers, in describing such assemblies, were intended to include all the persons holding immediately of the crown, who according to the charter of John, were required to be summoned to constitute the great council of the realm, for the purpose of granting aids to the Crown." (P. 449.) But it is not necessary to suppose this; those might have attended who lived near, or who were specially summoned. The committee argue on the supposition that all tenants in chief must have attended thrice a year, which no one probably ever asserted. But that William and his sons did hold public meetings, *de more*, at three several places, in every year, or at least very frequently, cannot be controverted without denying what respected historical testimonies affirm; and the language of these early writers intimates that they were numerously attended. Aids were not regularly granted, and laws much more rarely enacted

in them; but they might still be a national council. But the constituent parts of such councils will be discussed in a subsequent note.

It is to be here remarked, that, with the exception of the charters granted by William, Henry and Stephen, which are in general rather like confirmations of existing privileges than novel enactments, though some clauses appear to be of the latter kind, little authentic evidence can be found of any legislative proceedings from the Conquest to the reign of Henry II. The laws of the Conqueror, which we find in Ingulfus, do not come within this category; they are a confirmation of English usages, granted by William to his subjects. "Cez sunt les leis et les custumes que li reis William grantad el pople de Engleterre après le conquest de la terre. Iceles mesmes que li reis Edward sun cusin tint devant lui." These, published by Gale (Script. Rer. Anglic. vol. i.), and more accurately than before from the Holkham manuscript by Sir Francis Palgrave, have sometimes passed for genuine. The real original, however, is the Latin text, first published by him with the French. (Eng. Commonw., vol. ii. p. 89.) The French translation he refers to the early part of the reign of Henry III. At the time when Ingulfus is supposed to have lived, soon after the Conquest, no laws, as Sir F. Palgrave justly observes, were written in French, and he might have added, that we cannot produce any other specimen of the language which is certainly of that age. (See Quarterly Review, xxxiv. 260.) It is said in the charter of Henry I., that the laws of Edward were renewed by William with the some emendation.

But the changes introduced by William in the tenure of land were so momentous, that the most cautious inquirers have been induced to presume some degree of common consent by those whom they so much affected. "There seems to be evidence to show, that the great change in the tenure of land, and particularly the very extensive introduction of tenure by knight-service, was made by the consent of those principally interested in the land charged with the burthens of that tenure; and that the general

changes made in the Saxon laws by the Conqueror, forming of the two one people, was also effected by common consent; namely, in the language of the charter of William with respect to the tenures, 'per commune concilium tocius regni,' and with respect to both, as expressed in the charter of his son Henry, 'consilio baronum;' though it is far from clear who were the persons intended to be so described." (Report of Lords' Committee, p. 50.)

The separation of the civil and ecclesiastical jurisdictions was another great innovation in the reign of the Conqueror. This the Lords' Committee incline to refer to his sole authority. But Allen has shown by a writ of William, addressed to the bishop of Lincoln, that it was done "communi concilio, et consilio archiepiscoporum meorum, et cæterorum episcoporum et abbatum, et omnium principum regni mei." (Edinb. Rev. p. 15.) And the Domesday survey was determined upon, after a consultation of William with his great council at Gloucester, in 1084. This would of course be reckoned a legislative measure in the present day; but it might not pass for more than a temporary ordinance. The only laws under Henry I., except his charter, of which any account remains in history (there are none on record) fall under the same description.

The Constitutions of Clarendon, in 1164, are certainly a regular statute; whoever might be the consenting parties, a subject to be presently discussed, these famous provisions were enacted in the great council of the nation. This is equally true of the Assises of Northampton, in 1178. But the earliest Anglo-Norman law which is extant in a regular form, is the assise made at Clarendon for the preservation of the peace, probably between 1165 and 1176. This remarkable statute, "quam dominus rex Henricus, consilio archiepiscoporum, et episcoporum, et abbatum, cæterorumque baronum suorum constituit," was first published by Sir F. Palgrave from a manuscript in the British Museum. (Engl. Commonw. i. 257. ii. 168.) In other instances the royal prerogative may perhaps have been held sufficient for innovations which, after the consti-

tution became settled, would have required the sanction of the whole legislature. No act of parliament is known to have been made under Richard I.; but an ordinance, setting the assise of bread, in the fifth of John, is recited to be established "communi concilio baronum nostrorum." Whether these words afford sufficient ground for believing that the assise was set in a full council of the realm, may possibly be doubtful. The committee incline to the affirmative, and remark, that a general proclamation to the same effect is mentioned in history, but merely as proceeding from the king, so that "the omission of the words 'communi consilio baronum' in the proclamation mentioned by the historian, though appearing in the ordinance, tends also to show, that though similar words may not be found in other similar documents, the absence of those words ought not to lead to a certain conclusion that the act done had not the authority of the same common council." (P. 84.)

153.

CHARTER OF WILLIAM I.

Edit. 1826, vol. ii. p. 443. Edit. 1841, vol. ii. p. 105.

By some oversight, for which I cannot now account, I have referred for this charter of the Conqueror to Roger de Hoveden's collection of his laws. It is not found there, and on looking back to my own notes, I find it rightly referred to Wilkins's "Leges Anglo-Saxonicæ."

This charter has been introduced into the new edition of Rymer's Fœdera, and heads that collection. The Committee of the Lords on the Dignity of a Peer, in their Second Report, have the following observations — "The printed copy is taken from the Red Book of the Exchequer, a document which has long been admitted in the Court of Exchequer as evidence of authority for certain purposes; but no trace has been hitherto found of the original charter of William, though the insertion of a

copy in a book in the custody of the king's exchequer, resorted to by the judges of that court for other purposes, seems to afford reasonable ground for supposing that such a charter was issued, and that the copy so preserved is probably correct, or nearly correct. The copy in the Red Book is without date, and no circumstance tending to show its true date has occurred to the Committee; but it may be collected from its contents, that it was probably issued in the latter part of that king's reign; about which time it appears from history that he confirmed to his subjects in England the ancient Saxon laws, with alterations." (P. 50.)

I retract the remark in my text, that this charter seems to comprehend merely the feudal tenants of the crown. This may be true of one clause; but it is impossible to construe "omnes liberi homines totius monarchiæ," in so contracted a sense. The committee indeed observe, that many of the king's tenants were long after subject to tallage. But I do not suppose these to have been included in "liberi homines." The charter involves a promise of the crown to abstain from exactions frequent in the Conqueror's reign, and falling on mesne tenants and on others not liable to arbitrary taxation.

This charter contains a clause:—"Hoc quoque præcipimus ut omnes habeant et teneant legem Edwardi Regis in omnibus rebus adjunctis his quæ constituimus ad utilitatem Anglorum." And as there is apparent reference to these words in the charter of Henry I.—"Legem Edwardi Regis vobis reddo cum illis emendationibus quibus pater meus eam emendavit consilio baronum suorum"—the committee are sufficiently moderate in calling this "a clause, *tending to give in some degree* authenticity to the copy of the charter of William the Conqueror, inserted in the Red Book of the Exchequer." (P. 39.) This charter seems to be fully established: it deserves to be accounted the first remedial concession by the crown; for it indicates, especially taken in connexion with public history, an arbitrary exercise of royal power, which neither the new nor the old subjects of the English monarchy reckoned

lawful. It is also the earliest recognition of the Anglo-Saxon laws, such as they subsisted under the Confessor, and a proof both that the English were now endeavouring to raise their heads from servitude, and that the Normans had discovered some immunities from taxation, or some securities from absolute power, among the conquered people, in which they desired to participate. It is deserving of remark, that the distinction of personal law, which, indeed, had almost expired on the Continent, was never observed in England; at least, we have no evidence of it, and the contrary is almost demonstrable. The conquerors fell at once into the laws of the conquered, and this continued for more than a century.

The charter of William, like many others, was more ample than effectual. "The Committee have found no document to show, nor does it appear probable from any relation in history, that William ever obtained any general aid from his subjects by grant of a legislative assembly; though according to history, even after the charter beforementioned, he extorted great sums from individuals by various means, and under various pretences. Towards the close of his reign, when he had exacted, as stated by the editor of the first part of the Annals called the Annals of Waverley, the oath of fealty from the principal landholders of every description; the same historian adds that William passed into Normandy, 'adquisitis magnis thesauris ab hominibus suis, super quos aliquam causam invenire poterat, sive justè sive iniquè' (words which import exaction and not grant), and he died the year following in Normandy." (p. 35.)

The deeply learned reviewer of this report, has shown that the Annals of Waverley are of very little authority, and merely in this part a translation from the Saxon Chronicle. But the translation of the passage, quoted by the committee, is correct; and it was perhaps rather hypercritical to cavil at their phrase, that William obtained this money "by exaction and not by grant." They never meant that he imposed a general tax. That it was not by grant is all that their purpose required; the passage which they

quote shows that it was under some pretext, and often an unjust one, which is not very unlike exaction.

It is highly probable that in promising this immunity from unjust exactions, William did not intend to abolish the ancient tax of Danegelt, or to demand the consent of his great council when it was thought necessary to impose it. We read in the Saxon Chronicle, that the king in 1083 exacted a heavy tribute all over England, that is, seventy-two pence for each hyde. This looks like a Danegelt. The rumour of invasion from Denmark is set down by the chronicler under the year 1085; but probably William had reason to be prepared. He may have had the consent of his great council in this instance. But as the tax had formerly been perpetual, so that it was a relaxation in favour of the subject to reserve it for an emergency, we may think it more likely that this imposition was within his prerogative; that he, in other words, was sole judge of the danger that required it. It was, however, in truth, a heavy tribute, being six shillings for every hyde, in many cases, as we see by Domesday, no small proportion of the annual value, and would have been a grievous burthen as an annual payment.

154.

LAWS OF WILLIAM I.

Edit. 1826, vol. ii. p. 443. note †. Edit. 1841, vol. ii. p. 106. note ‡.

HODY does not so much infer this from the words of Hoveden, as from the great alterations visible on the face of the laws.

155.

HENRY I.

Edit. 1826, vol. ii. p. 443. Edit. 1841, vol. ii. p. 106.

THE accession of Henry inspired hopes into the English nation, which were not well realised. His marriage with Matilda, "of the rightful English kin," is mentioned with apparent pleasure by the Saxon Chronicler under the year 1100. And in a fragment of a Latin treatise on the English laws, praising them with a genuine feeling, and probably written in the earlier part of Henry's reign, the author extols his behaviour towards the people, in contrast with that of preceding times, and bears explicit testimony to the confirmation and amendment of Edward's laws by the Conqueror and by the reigning king — "Qui non solum legem regis Eadwardi nobis reddidit, quam omni gaudiorum delectatione suscepimus, sed beati patris ejus emendationibus roboratam propriis institutionibus honestavit." See Cooper on Public Records (vol. ii. p. 423.); in which very useful collection the whole fragment (for the first time in England) is published from a Cottonian manuscript. Henry ceased not, according to the Saxon Chronicle, to lay on many tributes. But it is reasonable to suppose that tallages on towns and on his demesne tenants, at that time legal, were reckoned among them.

156.

THIEVES HANGED AT LEICESTER.

Edit. 1826, vol. ii. p. 444. note ‡. Edit. 1841, vol. ii. p. 106. note ‖.

MR. TURNER translates this differently; but, as I conceive, without attending to the spirit of the context. (Hist. of Engl. vol. i. p. 174.)

157.

INTERMIXTURE OF NORMANS AND ENGLISH.

Edit. 1826, vol. ii. p. 444. note §. Edit. 1841, vol. ii. p. 106. note ¶.

THIS passage in a contemporary writer, being so unequivocal as it is, ought to have much weight in the question which an eminent foreigner has lately raised, as to the duration of the distinction between the Norman and English races. It is the favourite theory of M. Thierry, pushed to an extreme length both as to his own country and ours, that the conquering nation, Franks in one case, Normans in the other, remained down to a late period — a period indeed to which he assigns no conclusion — unmingled, or at least undistinguishable, constituting a double people of sovereigns and subjects, becoming a noble order in the state, haughty, oppressive, powerful, or what is in one word most odious to a French ear in the nineteenth century, aristocratic.

It may be worthy of consideration, since the authority of this writer is not to be disregarded, whether the Norman blood were really blended with the native quite so soon as the reign of Henry II.; that is, whether intermarriages, in the superior classes of society, had become so frequent as to efface the distinction. M. Thierry produces a few passages which seem to intimate its continuance. But these are too loosely worded to warrant much

regard; and he admits, that after the reign of Henry I. we have no proof of any hostile spirit on the part of the English towards the new dynasty; and that some efforts were made to conciliate them by representing Henry II. as the descendant of the Saxon line. (Vol. ii. p. 374.) This, in fact, was true; and it was still more important that the name of English was studiously assumed by our kings (ignorant though they might be, in M. Thierry's phrase, what was the vernacular word for that dignity), and that the Anglo-Normans are seldom, if ever, mentioned by that separate designation. England was their dwelling-place, English their name, the English law their inheritance; if this was not wholly the case before the separation of the mother-country under John, and yet we do not perceive much limitation necessary, it can admit of no question afterwards.

It is, nevertheless, manifest that the descendants of William's tenants *in capite*, and of others who seized on so large a portion of our fair country from the Channel to the Tweed, formed the chief part of that aristocracy which secured the liberties of the Anglo-Saxon race, as well as their own, at Runnymede; and which, sometimes as peers of the realm, sometimes as well-born commoners, placed successive barriers against the exorbitances of power, and prepared the way for that expanded scheme of government which we call the English constitution. The names in Dugdale's Baronage, and in his Summonitiones ad Parliamentum, speak for themselves; in all the earlier periods, and perhaps almost through the Plantagenet dynasty, we find a great preponderance of such as indicate a French source. New families sprung up by degrees, and are now sometimes among our chief nobility; but in general, if we find any at this day who have tolerable pretensions to deduce their lineage from the Conquest, they are of Norman descent; the very few Saxon families that may remain with an authentic pedigree in the male line, are seldom found in the wealthier class of gentry. This is of course to be taken with deference to the genealogists. And on this account I must confess that M. Thierry's opinion of

a long-continued distinction of races has more semblance of truth as to this kingdom, than can be pretended as to France, without a blind sacrifice of undeniable facts at the altar of plebeian malignity. In the celebrated Lettres sur l' Histoire de France, published about 1820, there seems to be no other aim than to excite a factious animosity against the ancient nobility of France, on the preposterous hypothesis that they are descended from the followers of Clovis; that Frank and Gaul have never been truly intermingled; and that a conquering race was, even in this age, attempting to rivet its yoke on a people who disdained it. This strange theory, or something like it, had been announced, in a very different spirit, by Boulainvilliers in the last century. But of what family in France, unless possibly in the eastern part, can it be determined with confidence, whether the founder were Frank or Gallo-Roman? Is it not a moral certainty that many of the most ancient, especially in the south, must have been of the latter origin? It would be highly wrong to revive such obsolete distinctions in order to keep up social hatreds, were they founded in truth; but what shall we say, if they are purely chimerical?

158.

VEL PER LEGEM TERRÆ.

Edit. 1826, vol. ii. p. 449. note *. Edit. 1841, vol. ii. p. 109.

PERHAPS the best sense of the disjunctive will be perceived by remembering that "judicium parium" was generally opposed to the combat or the ordeal, which were equally *lex terræ*.

159.

OMISSION IN THE CHARTERS OF HENRY III.

Edit. 1826, vol. ii. p. 453. Edit. 1841, vol. ii. p. 112.

THE omission was hardly for the motive given in the text; the levying extraordinary aids without the consent of the great council was already illegal by the charters of William I., Henry I., Stephen, and Henry II. There was probably a different reason, which will be mentioned in a subsequent note.

160.

BRACTON.

Edit. 1826, vol. ii. p. 460. Edit. 1841, vol. ii p. 116.

ALLEN has pointed out that the king might have been sued in his own courts, like one of his subjects, until the reign of Edward I., who introduced the method of suing by petition of right; and in the Year Book of Edward III., one of the judges says that he has seen a writ beginning—*Præcipe Henry regi Angliæ.* Bracton, however, expressly asserts the contrary, as Mr. Allen owns; so that we may reckon this rather doubtful. Bracton has some remarkable words which I have omitted to quote: after he has broadly asserted that the king has no superior but God, and that no remedy can be had by law against him, he proceeds:—"Nisi sit qui dicat, quod universitas regni et baronagium suum hoc facere debeant et possint in curia ipsius regis." By *curia* we must here understand parliament, and not the law courts.

161.

CURIA REGIS.

Edit 1826; vol. ii. p. 462. Edit. 1841, vol. ii. p. 118.

It appears to have been the opinion of Madox, and probably has been taken for granted by most other antiquaries, that this court, denominated *Aula* or *Curia Regis*, administered justice when called upon, as well as advised the crown in public affairs, during the first four Norman reigns as much as afterwards. Allen, however, maintained (Edinb. Rev. xxvi. p. 364.), that "the administration of justice in the last resort belonged originally to the great council. It was the king's baronial court, and his tenants in chief were the suitors and judges." Their unwillingness and inability to deal with intricate questions of law, which after the simpler rules of Anglo-Saxon jurisprudence were superseded by the subtleties of Normandy, became continually more troublesome, led to the separation of an inferior council from that of the legislature, to both which the name *Curia Regis* is for some time indifferently applied by historians. This was done by Henry II., as Allen conjectures, at the great council of Clarendon in 1164.

The Lords' Committee took another view, and one, it must be confessed, more consonant to the prevailing opinion. "The ordinary council of the king, properly denominated by the word 'concilium' simply, seems always to have consisted of persons selected by him for that purpose; and these persons in later times, if not always, took an oath of office, and were assisted by the king's justiciaries or judges, who seem to have been considered as members of this council; and the chief justiciar, the treasurer and chancellor, and some other great officers of the crown, who might be styled the king's confidential ministers, seem also to have been always members of this select council; the chief justiciar, from the high rank attributed to his office, generally acting as president.

This select council was not only the king's ordinary council of state, but formed the supreme court of justice, denominated *Curia Regis*, which commonly assembled three times in every year, wherever the king held his court at the three great feasts of Easter; Whitsuntide, and Christmas, and sometimes also at Michaelmas. Its constant and important duty at those times was the administration of justice." (p. 20.)

It has been seen in a former note, that the meetings *de more*, three times in the year, are supposed by Mr. Allen to have been of the great council, composed of the baronial aristocracy. The positions, therefore, of the Lords' Committee, were of course disputed in his celebrated review of their Report. "So far is it," he says, "from being true that the term Curia Regis, in the time of the Conqueror and his immediate successors, meant the king's high court of justice, as distinguished from the legislature, that it is doubtful whether such a court then existed." (Ed. Rev. xxxv. 6.) This is expressed with more hesitation than in the earlier article, and in a subsequent passage we read that "the high court of justice, to which the committee would restrict the appellation of Curia Regis, and of which such frequent mention is made under that name, in our early records and courts of law, was confirmed and fully established by Henry II., if not originally instituted by that prince." (p. 8.)

The argument of Mr. Allen rests very much on the judicial functions of the witenagemot, which we may consider as maintained in its substantial character by the great councils or parliaments of the Norman dynasty. In this we may justly concur; but we have already seen how far he is from having a right to assume that the Anglo-Saxon kings, though they might administer justice in the full meetings called witenagemots, were restrained from its exercise before a smaller body more permanently attached to their residence. It is certain that there was an appeal to the king's court for denial of justice in that of the lord having territorial jurisdiction, and as the words and the reason imply, from that of the sheriff. (Leg. Hen. I. c. 58.).

This was also the law before the Conquest. But the plaintiff incurred a fine, if he brought his cause in the first instance before the king. (Thorpe's Ancient Laws, p. 85.; and see Edinb. Rev. xxxv. 10.) It hardly appears evident, that these cases, rare probably and not generally interesting, might not be determined ostensibly, as they would, on any hypothesis, be in reality, by the chancellor, the high justiciar, and other great officers of the crown, during the intervals of the national council; and this is confirmed by the analogy of the royal courts in France, which were certainly not constituted on a very broad basis. The feudal court of a single barony might contain all the vassals, but the inconvenience would have become too great, if the principle had been extended to all the tenants-in-chief of the realm. This relates to the first four reigns, for which we are reduced to these grounds of probable and analogical reasoning, since no proof of the distinct existence of a judicial court seems to be producible.

In the reign of Henry II. a court of justice is manifestly distinguishable, both from the select and from the greater council. "In the Curia Regis were discussed and tried all pleas immediately concerning the king and the realm; and suitors were allowed, on payment of fines, to remove their plaints from inferior jurisdictions of Anglo-Saxon creation into this court, by which a variety of business was wrested from the ignorance and partiality of lower tribunals, to be more confidently submitted to the decision of judges of high reputation. Some plaints were also removed into the Curia Regis by the express order of the king, others by the justices, then itinerant, who not unfrequently felt themselves incompetent to decide upon difficult points of law. Matters of a fiscal nature, together with the business performed by the Chancery, were also transacted in the Curia Regis. Such a quantity of miscellaneous business was at length found to be so perplexing and impracticable, not only to the officers of the Curia Regis, but also to the suitors themselves, that it became absolutely necessary to devise a remedy for the increasing evil. A division of that court into distinct departments was

the consequence; and thenceforth pleas touching the crown, together with common pleas of a civil and criminal nature, were continued to the Curia Regis; plaints of a fiscal kind were transferred to the Exchequer; and for the Court of Chancery were reserved all matters unappropriated to the other courts." (Hardy's Introduction to Close Rolls, p. 23.)

Mr. Hardy quotes a passage from Benedict Abbas, a contemporary historian, which illustrates very remarkably the development of our judicial polity. Henry II., in 1176, reduced the justices in the Curia Regis from eighteen to five; and ordered that they should hear and determine all writs of the kingdom—not leaving the king's court, but remaining there for that purpose; so that if any question should arise which they could not settle, it it should be referred to the king himself, and be decided as it might please him and the wisest men of the realm. And this reduction of the justices from eighteen to five, is said to have been made *per consilium sapientium regni sui;* which may, perhaps, be understood of parliament. But we have here a distinct mention of the Curia Regis, as a standing council of the king, neither to be confounded with the great council or parliament, nor with the select body of judges, which was now created as an inferior, though most important tribunal. From this time, and probably from none earlier, we may date the commencement of the Court of King's Bench, which very soon acquired, at first indifferently with the council, and then exclusively, the appellation of Curia Regis.

The rolls of the Curia Regis, or Court of King's Bench, begin in the sixth year of Richard I. They are regularly extant from that time; but the usage of preserving a regular written record of judicial proceedings was certainly practised in England during the preceding reign. The roll of Michaelmas Term, in 9 John, contains a short transcript of certain pleadings in 7 Hen. II., "proving that the mode of enrolment was then entirely settled." (Palgrave's Introduction to Rot. Cur. Regis, p. 2.) This authentic precedent (in 1161), though not itself extant,

must lead us to carry back the judicial character of the Curia Regis, and that in a perfectly regular form, at least to an early part of the reign of Henry II.; and this is more probable than the date conjectured by Allen, the assembly at Clarendon in 1164.* But in fact the interruption of the regular assemblies of the great council, thrice a year, which he admits to date from the reign of Stephen, would necessitate, even on his hypothesis, the institution of a separate court or council, lest justice should be denied or delayed. I do not mean that in the seventh year of Henry II. there was a Court of King's Bench, distinct from the select council, which we have not any grounds for affirming, and the date of which I, on the authority of Benedict Abbas, have inclined to place several years lower, but that suits were brought before the king's judges by regular process, and recorded by regular enrolment.

These rolls of the *Curia Regis*, or the King's Court, held before his justices or justiciars, are the earliest consecutive judicial records in existence. The Olim Registers of the Parliament of Paris, next to our own in antiquity, begin in 1254.† (Palgrave's Introduction, p. 1.) Every reader, he observes, will be struck by the great quantity of business transacted before the justiciars. "And when we recollect the heavy expenses which, even at this period, were attendant upon legal proceedings, and the difficulties of communication between the remote parts of the kingdom and the central tribunal, it must appear evident that so many cases would not have been prosecuted in the king's court, had not some very decided advantage been derived from this source." (p. 6.) The issues of fact, however, were remitted to be tried by a jury of the vicinage; so that, possibly, the expense might not be quite so considerable as is here suggested. And the jurisdiction of the county and hundred courts was so limited in real actions,

* This discovery has led Sir F. Palgrave to correct his former opinion, that the rolls of Curia Regis under Richard I. are probably the first that ever existed, Glanvil giving us no reason to presume any written records in his time.—English Commonw. vol. ii. p. 1.

† They are published in the Documens Inédits, 1839, by M. Beugnot.

or those affecting land, by the assises of novel dissesin and mort d'ancestor, that there was no alternative but to sue before the courts at Westminster.

It would be travelling beyond the limits of my design, to dwell longer on these legal antiquities. The reader will keep in mind the three-fold meaning of Curia Regis: the common council of the realm, already mentioned in a former note, and to be discussed again; the select council for judicial as well as administrative purposes; and the Court of King's Bench, separated from the last in the reign of Henry II., and soon afterwards acquiring, exclusively, the denomination Curia Regis.

In treating the judges of the Court of Exchequer as officers of the crown, rather than nobles, I have followed the usual opinion. But Allen contends that they were "barons, selected from the common council of the realm, on account of their rank or reputed qualifications for the office." They met in the palace; and their court was called Curia Regis, with the addition, "ad scaccarium." Hence Fleta observes, that after the Court of Exchequer was filled with mere lawyers, they were styled barons, because formerly real barons had been the judges; "justiciarios ibidem commorantes barones esse dicimus, eo quod suis locis barones sedere solebant." (Edinb. Rev. xxxv. 11.) This is certainly an important remark. But in practice it is to be presumed that the king selected such barons (a numerous body, we should remember) as were likely to look well after the rights of the crown. The Court of Exchequer is distinctly traced to the reign of Henry I.

162.

JUSTICES OF ASSISE.

Edit. 1826, vol. ii. p. 463. Edit. 1841, vol. ii. p. 119.

JUSTICES in eyre, or, as we now call them, of assise, were sometimes commissioned in the reign of Henry I.

(Hardy's Introduction to Close Rolls.) They do not appear to have gone their circuits regularly before 22 Hen. II. (1176.)

163.

HEREDITARY SUCCESSION OF KINGS.

Edit. 1826, vol. ii. p. 472. Edit. 1841, vol. ii. p. 125.

THE theory of succession to the crown in the Norman period intimated in the text, has now been extensively received. "It does not appear," says Mr. Hardy, "that any of the early English monarchs exercised any act of sovereign power or disposed of public affairs till after their election and coronation. . . . . These few examples appear to be undeniable proofs that the fundamental laws and institutions of this kingdom, based on the Anglo-Saxon custom, were at that time against an hereditary succession unless by common consent of the realm." (Introduction to Close Rolls, p. 35.) It will be seen that this abstinence from all exercise of power cannot be asserted without limitation.

The early kings always date their reign from their coronation, and not from the decease of their predecessor, as is shown by Sir Harris Nicolas, in his Chronology of History. (p. 272.) It had been with less elaborate research pointed out by Mr. Allen, in his Inquiry into the Royal Prerogative. The former has even shown that an exception which Mr. Allen had made in respect of Richard I. of whom he supposes public acts to exist, dated in the first year of his reign, but before his coronation, ought not to have been made; having no authority but a blunder made by the editors of Rymer's Fœdera, in antedating, by one month, the decease of Henry II., and, following up that mistake by the usual assumption that the successor's reign commenced immediately, in placing some instruments bearing date in the first year of Richard, just twelve months too early. This discovery has been con-

firmed by Mr. W. Hardy in the 27th volume of the "Archæologia" (p. 109.), by means of a charter in the archives of the Duchy of Lancaster, where Richard, before his coronation, confirms the right of Gerald de Camville and his wife Nichola, to the inheritance of the said Nichola in England and Normandy, with an additional grant of lands. In this he calls himself, "Ricardus Dei gratiâ dominus Angliæ." It has been observed, as another slighter circumstance, that he uses the form *ego* and *meus*, instead of *nos* and *noster*.

Whatever, therefore, may have been the case in earlier reigns, all the kings, indeed, except Henry II., having come in by a doubtful title, we perceive that, as has been before said in the text on the authority of an historian, Richard I. acted in some respects as king before the title was constitutionally his by his coronation. It is now known that John's reign began with his coronation, and that this is the date from which his charters, like those of his predecessors, are reckoned. But he seems to have acted as king before. (Palgrave's Introduction to Rot. Cur. Regis, vol. i. p. 91.; and further proof is adduced in the Introduction to the second volume.) Palgrave thinks the reign virtually began with the proclamation of the king's peace, which was at some short interval after the demise of the predecessor. He is positive indeed that the Anglo-Saxon kings had no right before their acceptance by the people at their coronation. But, "after the Conquest" he proceeds, "it is probable, for we can only speak doubtingly and hypothetically, that the heir obtained the royal authority, at least for the purposes of administering the law, from the day that his peace was proclaimed. He was obeyed as chief magistrate, so soon as he was admitted to the high office of protector of the public tranquillity. But he was not honoured as the king, until the sacred oil had been poured upon him, and the crown set upon his head, and the sceptre grasped in his hand." (Introduct. to Rot. Cur. Reg. p. 92.)

This hypothesis, extremely probable in all cases where no opposition was contemplated, is not entirely that of

Allen, Hardy, and Nicolas; and it seems to imply an admitted right, which indeed cannot be disputed in the case of Henry II., who succeeded by virtue of a treaty assented to by the baronage, nor is it likely to have been in the least doubtful when Richard I. and Henry III. came to the throne. It is important, however, for the unlearned reader to be informed that he has been deceived by the almanacs and even the historians, who lay it down that a king's reign has always begun from the death of his predecessor: and yet, that, although not bearing the royal name before his coronation, the interval of a vacant throne was virtually but of a few days; the successor taking on him the administration without the royal title, by causing public peace to be proclaimed.

The original principle of the necessity of consent to a king's succession was in some measure preserved, even at the death of Henry III. in 1272, when fifty-six years of a single reign might have extinguished almost all personal recollections of precedent. "On the day of the king's burial, the barons swore fealty to Edward I. then absent from the realm, and from this his reign is dated." Four days having elapsed between the death of Henry and the recognition of Edward as king, the accession of the latter was dated, not from his father's death, but from his own recognition. Henry died on the 16th of November, and his son was not acknowledged king till the 20th. (Allen's Inquiry, p. 44., quoting Palgrave's Parliamentary Writs.) Thus this recognition by the oath of fealty came in and was in the place of the coronation, though with the important difference, that there was no reciprocity.

164.

PRIVATE WAR.

Edit. 1826, vol. ii. p. 480. Edit. 1841, vol. ii. p. 130.

MR. ALLEN has differed from me on the lawfulness of private war, quoting another passage from Glanvil, and one from Bracton (Edinb. Rev. xxx. 168.); and I modified the passage, after the first edition, in consequence of his remarks. But I adhere to the substance of what I have said. It appears, indeed, that the king's peace was originally a personal security, granted by charter under his hand or seal, which could not be violated without incurring a penalty. Proofs of this are found in Domesday, and it was a Saxon usage, derived from the old Teutonic *mundeburde*. William I., if we are to believe what is written, maintained the peace throughout the realm. But the general proclamation of the king's peace at his accession, which became the regular law, may have been introduced by Henry II. Palgrave, to whom I am indebted, states this clearly enough. "Peace is stated in Domesday to have been given by the king's seal, that is, by a writ under seal. This practice, which is not noticed in the Anglo-Saxon laws, continued in the protections granted at a much later period; though after the general law of the king's peace was established, such a charter had ceased to afford any special privilege. All the immunities arising from residence within the verge or ambit of the king's presence — from the truces, as they are termed in the Continental laws, which recurred at the stated times and seasons — and also from the "handselled" protection of the king, were then absorbed in the general declaration of the peace upon the accession of the new monarch. This custom was probably introduced by Henry II. It is inconsistent with the laws of Henry I.; which, whether an authorised collection or not, exhibit the jurisprudence of that period, but it is wholly accordant with the subsequent

tenor of the proceedings of the Curia Regis." (English Commonwealth, vol. ii. p. 105.)

A few words in Glanvil (those in Bracton are more ambiguous), which may have been written before the king's peace was become a matter of permanent law, or may rather refer to Normandy than England, ought not, in my opinion, to be set against so clear a declaration. The right of private war, in the time of Henry II., was giving way in France; and we should always remember that the Anglo-Norman government was one of high prerogative. The paucity of historical evidence, or that of records, for private war as an usual practice, is certainly not to be overlooked.

165.

ETYMOLOGY OF SOCAGE.

Edit. 1826, vol. ii. p. 481. Edit. 1841, vol. ii. p. 131.

IT now appears strange to me, that I could have given the preference to Littleton's derivation of *socage* from *soc de charue*. The word sokeman, which occurs so often in Domesday, is continually coupled with *soca*, a franchise or right of jurisdiction belonging to the lord, whose tenant, or rather suitor, the sokeman is described to be. *Soc* is an idle and improbable etymology; especially as at the time when sokeman was most in use, there was hardly a word of a French root in the language. *Soc* is plainly derived from *seco*, and therefore cannot pass for a Teutonic word.

166.

CONFIRMATIO CHARTARUM.

Edit. 1826, vol. iii. p. 5. Edit. 1841, vol. ii. p. 138.

THE *Confirmatio Chartarum* is properly denominated a statute, and always printed as such; but in form, like Magna Charta, it is a charter, or letters patent, proceeding from the crown, without even reciting the consent of the realm. And its *teste* is at Ghent, 2 Nov. 1297.; Edward having engaged, conjointly with the count of Flanders, in a war with Philip the Fair. But a parliament had been held at London, when the barons insisted on these concessions. The circumstances are not wholly unlike those of Magna Charta.

The Lords' Committee do not seem to reject the statute *de tallagio non concedendo* altogether, but say that, "if the manuscript containing it (in Corpus Christi College, Cambridge), is a true copy of a statute, it is undoubtedly a copy of a statute of the 25th, and not of a statute of the 34th of Edward I." (p. 230.) It seems to me on comparing the two, that the supposed statute *de tallagio* is but an imperfect transcript of the king's charter at Ghent. But at least, as one exists in an authentic form, and the other is only found in an unauthorised copy, there can be no question which ought to be quoted.

167.

CONSTITUTION OF PARLIAMENT IN NORMAN REIGNS.

Edit. 1826, vol. iii. p. 15. Edit. 1841, vol. ii. p. 143.

THE constitution of parliament in this period, antecedent to the Great Charter, has been minutely and scrupulously investigated by the Lords' Committee on the dignity of a

Peer in 1819. Two questions may be raised as to the lay portion of the great council of the nation from the Conquest to the reign of John: — first, Did it comprise any members, whether from the counties or boroughs, not holding themselves, nor deputed by others holding in chief of the crown by knight-service or grand serjeanty? secondly, Were all such tenants *in capite* personally, or in contemplation of law, assisting, by advice and suffrage, in councils held for the purpose of laying on burthens, or for permanent and important legislation?

The former of these questions they readily determine. The committee have discovered no proof, nor any likelihood from analogy, that the great council, in these Norman reigns, was composed of any who did not hold in chief of the crown by a military tenure, or one in grand serjeanty; and they exclude, not only tenants in petty serjeanty and socage, but such as held of an escheated barony, or, as it was called, *de honore*.

They found more difficulty in the second question. It has generally been concluded, and I may have taken it for granted in my text, that all military tenants *in capite* were summoned, or ought to have been summoned, to any great council of the realm, whether for the purpose of levying a new tax, or any other affecting the public weal. The committee, however, laudably cautious in drawing any positive inference, have moved step by step through this obscure path with a circumspection as honourable to themselves, as it renders their ultimate judgment worthy of respect.

"The council of the kingdom, however composed (they are adverting to the reign of Henry I.), must have been assembled by the king's command; and the king, therefore, may have assumed the power of selecting the persons to whom he addressed the command, especially if the object of assembling such a council was not to impose any burthen on any of the subjects of the realm exempted from such burthens except by their own free grants. Whether the king was at this time considered as bound by any constitutional law to address such command to

any particular persons, designated by law as essential parts of such an assembly for all purposes, the committee have been unable to ascertain. It has generally been considered as the law of the land, that the king had a right to require the advice of any of his subjects, and their personal services, for the general benefit of the kingdom; but as, by the terms of the charters of Henry and of his father, no aid could be required of the immediate tenants of the crown by military service, beyond the obligation of their respective tenures, if the crown had occasion for any extraordinary aid from those tenants, it must have been necessary, according to law, to assemble all persons so holding, to give their consent to the imposition. Though the numbers of such tenants of the crown were not originally very great, as far as appears from Domesday, yet if it was necessary to convene all to form a constitutional legislative assembly, the distances of their respective residences and the inconvenience of assembling at one time, in one spot, all those who thus held of the Crown, and upon whom the maintenance of the Conquest itself must for a considerable time, have importantly depended, must have produced difficulties, even in the reign of the Conqueror; and the increase of their numbers by subdivision of tenures must have greatly increased the difficulty in the reign of his son Henry: and at length, in the reigns of his successors, it must have been almost impossible to have convened such an assembly, except by general summons of the greater part of the persons who were to form it; and unless those who obeyed the summons could bind those who did not, the powers of the assembly, when convened, must have been very defective." (p. 40.)

Though I do not perceive why we should assume any great subdivision of tenures, before the statute of *Quia Emptores*, in 18 Edw. I. which prohibited sub-infeudation, it is obvious that the committee have pointed out the inconvenience of a scheme, which gave all tenants *in capite* (more numerous in Domesday than they perhaps were aware) a right to assist at great councils. Still, as it is manifest from the early charters, and explicitly admitted

by the committee, that the king could raise no extraordinary contribution from his immediate vassals by his own authority, and as there was no feudal subordination between one of these and another, however differing in wealth, it is clear that they were legally entitled to a voice, be it through general or special summons, in the imposition of taxes which they were to pay. It will not follow, that they were summoned, or had an acknowledged right to be summoned, on the few other occasions when legislative measures were in contemplation, or in the determinations taken by the king's great council. This can only be inferred by presumptive proof or constitutional analogy.

The eleventh article of the Constitutions of Clarendon in 1164, declares that archbishops, bishops, and all persons of the realm who hold of the king *in capite*, possess their lands as a barony, and are bound to attend in the judgments of the king's court like other barons. It is plain from the general tenor of these constitutions, that "universæ personæ regni" must be restrained to ecclesiastics; and the only words which can be important in the present discussion are, "sicut barones cæteri." "It seems," say the committee, "to follow that all those termed the king's barons were tenants-in-chief of the king; but it does not follow that all tenants-in-chief of the king were the king's barons, and as such bound to attend his court. They might not be bound to attend, unless they held their lands of the king in chief, 'sicut baroniam,' as expressed in this article with respect to the archbishops and other clergy." (p. 44.) They conclude, however, that "upon the whole, the Constitutions of Clarendon, if the existing copies be correct, afford strong ground for presuming, that owing suit to the king's great court rendered the tenant one of the king's barons or members of that court, though probably in general none attended who were not specially summoned. It has been already observed that this would not include all the king's tenants-in-chief, and particularly those who did not hold of him as of his crown, or even to all who did hold of him as of his crown, but not by knight-service or grand serjeanty, which were alone deemed

military and honourable tenures; though whether all who held of the king as of his crown, by knight-service or grand serjeanty, did originally owe suit to the king's court, or whether that obligation was confined to persons holding by a particular tenure, called *tenure per baroniam*, as has been asserted, the Constitutions of Clarendon do not assist to ascertain." (p. 45.) But this, as they point out, involves the question, whether the *Curia Regis*, mentioned in these Constitutions, was not only a judicial, but a legislative assembly, or one competent to levy a tax on military tenants; since by the terms of the charter of Henry I., confirmed by that of Henry II., all such tenants were clearly exempted from taxation, except by their own consents.

They touch slightly on the reign of Richard I. with the remark, that "the result of all which they have found with respect to the constitution of the legislative assemblies of the realm, still leaves the subject in great obscurity." (p. 49.) But it is remarkable, that they have never alluded to the presence of tenants-in-chief, knights as well as barons, at the parliament of Northampton, under Henry II. They come, however, rather suddenly to the conclusion, that "the records of the reign of John seem to give strong ground for supposing, that all the king's tenants-in-chief by military tenure, if not all the tenants-in-chief*, were at one time deemed necessary members of the common councils of the realm, when summoned for extraordinary purposes, and especially for the purpose of obtaining a grant of any extraordinary aid to the king; and this opinion accords with what has generally been deemed originally the law in France, or other countries where what is called the feudal system of tenures has been established." (p. 54.) It cannot surely admit of a doubt,

* This hypothetical clause is somewhat remarkable. Grand serjeanty is of course included by parity under military service. But did any hold of the king in socage, except on his demesne lands? There might be some by petty serjeanty. Yet the committee, as we have just seen, absolutely exclude these from any share in the great councils of the Conqueror and his immediate descendants.

and has been already affirmed more than once by the committee, that for an extraordinary grant of money the consent of military tenants-in-chief was required, long before the reign of John. Nor was that a reign, till the enactment of the Great Charter, when any fresh extension of political liberty was likely to have become established. But the difficulty may still remain with respect to "extraordinary purposes" of another description.

They observe, afterwards, that "they have found no document before the Great Charter of John, in which the term, 'majores barones' has been used, though in some subsequent documents, words of apparently similar import have been used. From the instrument itself it might be presumed that the term, 'majores barones' was then a term in some degree understood; and that the distinction had, therefore, an earlier origin, though the Committee have not found the term in any earlier instrument." (p. 67.) But, though the Dialogue on the Exchequer, referred to the reign of Henry II., is not an instrument, it is a law-book of sufficient reputation, and in this we read: — "Quidam de rege tenent in capite quæ ad coronam pertinent; baronias scilicet majores seu minores." (Lib. ii. cap. 10.) It would be trifling to dispute, that the tenant of a *baronia major* might be called a *baro major*. And what could the *secundæ dignitatis barones* at Northampton have been, but tenants *in capite* holding fiefs by some line or other distinguishable from a superior class? *

It appears, therefore, on the whole, that in the judgment of the Committee, by no means indulgent in their requisition of evidence, or disposed to take the more popular side, all the military tenants *in capite* were constitutionally members of the *commune concilium* of the realm

* Mr. Spence has ingeniously conjectured, observing that in some passages of Domesday (he quotes two, but I only find one) the barons who held more than six manors paid their relief directly to the king, while those who had six or less paid theirs to the sheriff (Yorkshire, 298. b.), that "this may tend to solve the disputed question as to what constituted one of the greater barons mentioned in the Magna Charta of John and other early Norman documents; for, by analogy to the mode in which the relief was paid, the greater barons were summoned by particular writs, the rest by one general summons through the sheriff." — History of Equitable Jurisdiction, p. 40.

during the Norman constitution. This *commune concilium* the committee distinguish from a *magnum concilium*, though it seems doubtful whether there were any very definite line between the two. But that the consent of these tenants was required for taxation they repeatedly acknowledge. And there appears sufficient evidence that they were occasionally present for other important purposes. It is, however, very probable that writs of summons were actually addressed only to those of distinguished name, to those resident near the place of meeting, or to the servants and favourites of the crown. This seems to be deducible from the words in the Great Charter, which limit the king's engagement to summon all tenants-in-chief, through the sheriff, to the case of his requiring an aid or scutage, and still more from the withdrawing of this promise in the first year of Henry III. The privilege of attending on such occasions, though legally general, may never have been generally exercised.

The committee seem to have been perplexed about the word *magnates*, employed in several records to express part of those present in great councils. In general they interpret it, as well as the word *proceres*, to include persons not distinguished by the name "*barones*;" a word which in the reign of Henry III. seems to have been chiefly used in the restricted sense it has latterly acquired. Yet in one instance, a letter addressed to the justiciar of Ireland, 1 Hen. III., they suppose the word *magnates* to "exclude those termed therein 'alii quamplurimi;' and consequently to be confined to prelates, earls, and barons. This may be deemed important in the consideration of many other instruments in which the word *magnates* has been used to express persons constituting the 'commune concilium regni.'" But this strikes me as an erroneous construction of the letter. The words are as follows:— "Convenerunt apud Glocestriam plures regni nostri magnates, episcopi, abbates, comites, et barones, qui patri nostro viventi semper astiterunt fideliter et devotè, et alii quamplurimi; applaudentibus clero et populo, &c., publicè fuimus in regem Angliæ inuncti et coronati." (p. 77.) I

think that *magnates* is a collective word, including the "alii quamplurimi." It appears to me that *magnates*, and, perhaps, some other Latin words, correspond to the witan of the Anglo-Saxons, expressing the legislature in general, under which were comprised those who held peculiar dignities, whether lay or spiritual. And upon the whole we may be led to believe, that the Norman great council was essentially of the same composition as the witenagemot which had preceded it; the king's thanes being replaced by the barons of the first or second degree, who, whatever may have been the distinction between them, shared one common character, one source of their legislative rights—the derivation of their lands as immediate fiefs from the crown.

The result of the whole inquiry into the constitution of parliament, down to the reign of John, seems to be:—1. That the Norman kings explicitly renounced all prerogative of levying money on the immediate military tenants of the crown, without their consent given in a great council of the realm; this immunity extending also to their sub-tenants and dependants. 2. That all these tenants-in-chief had a constitutional right to attend, and ought to be summoned; but whether they could attend without a summons is not manifest. 3. That the summons was usually directed to the higher barons, and to such of a second class as the king pleased; many being omitted for different reasons, though all had a right to it. 4. That on occasions when money was not to be demanded, but alterations made in the law, some of these second barons, or tenants-in-chief, were at least occasionally summoned; but whether by strict right or usage does not fully appear. 5. That the irregularity of passing many of them over, when councils were held for the purpose of levying money, led to the provision in the Great Charter of John, by which the king promises that they shall all be summoned through the sheriff on such occasions; but the promise does not extend to any other subject of parliamentary deliberation. 6. That even this concession, though but the recognition of a known right, appeared so dan-

gerous to some in the government, that it was withdrawn in the first charter of Henry III.

The charter of John, as has just been observed, while it removes all doubt, if any could have been entertained, as to the right of every military tenant *in capite* to be summoned through the sheriff, when an aid or scutage was to be demanded, will not of itself establish their right of attending parliament on other occasions. The language, therefore, of my text is too unlimited. We cannot absolutely assume any to have been, in a general sense, members of the legislature except the prelates and the *majores barones*. But who were these, and how distinguished? For distinguished they must now have become, and that by no new provision, since none is made. The right of personal summons did not constitute them, for it is on *majores barones*, as already a determinate rank, that the right is conferred. The extent of property afforded no definite criterion; at least some baronies, which appear to have been of the first class, comprehended very few knights' fees; yet it seems probable that this was the original ground of distinction.*

The charter, as renewed in the first year of Henry III., does not only omit the clause prohibiting the imposition of aids and scutages without consent, and providing for the summons of all tenants *in capite* before either could be levied, but gives the following reason for suspending this and other articles of King John's charter:—"Quia vero quædam capitula in priori cartâ continebantur, quæ gravia et dubitabilia videbantur, *sicut de scutagiis et auxiliis assidentis* . . . . placuit supra-dictis prælatis et magnatibus ea esse in respectu, quousque plenius consilium habuerimus, et tunc faciemus plurissimè, tam de his quam de aliis quæ occurrerint emendanda, quæ ad communem omnium utilitatem pertinuerint, et pacem et statum nostrum et regni nostri." This charter was made but twenty-four days

* See quotation from Spence's Equitable Jurisdiction, a little above. The barony of Berkeley was granted in 1 Ric. I., to be holden by the service of five knights, which was afterwards reduced to three.—Nicolas's Report of Claim to Barony of L'Isle, Appendix, p. 318.

after the death of John; and we may agree with the committee (p. 77.) in thinking it extraordinary that these deviations from the charter of Runnymede, in such important particulars, have been so little noticed. It is worthy of consideration, in what respects the provisions respecting the levying of money could have appeared grave and doubtful. We cannot believe that the earl of Pembroke, and the other barons who were with the young king, himself a child of nine years old, and incapable of taking a part, meant to abandon the constitutional privilege of not being taxed in aids without their consent. But this they might deem sufficiently provided for by the charters of former kings, and by general usage. It is not, however, impossible that the government demurred to the prohibition of levying scutage, which stood on a different footing from extraordinary aids; for scutage appears to have been formerly taken without consent of the tenants; and in the second charter of Henry III. there is a clause, that it should be taken as it had been in the time of Henry II. This was a certain payment for every knight's fee; but if the original provision of the Runnymede charter had been maintained, none could have been levied without consent of parliament.

It seems also highly probable, that, before the principle of representation had been established, the greater barons looked with jealousy on the equality of suffrage claimed by the inferior tenants *in capite*. That these were constitutionally members of the great council, at least in respect of taxation, has been sufficiently shown; but they had hitherto come in small numbers, likely to act always in subordination to the more potent aristocracy. It became another question, whether they should all be summoned, in their own counties, by a writ selecting no one through favour, and in its terms compelling all to obey. And this question was less for the crown, which might possibly find its advantage in the disunion of its tenants, than for the barons themselves. They would naturally be jealous of a second order, whom in their haughtiness they held much beneath them, yet by whom they might be out-numbered

in those councils where they had bearded the king. No effectual or permanent compromise could be made but by representation, and the hour for representation was not come.

168.

DELEGATES SUMMONED BY WILLIAM I.

Edit. 1826, vol. iii. p. 19. Edit. 1841, vol. ii. p. 146.

THIS assembly is mentioned in the preamble, and afterwards, of the spurious laws of Edward the Confessor; and I have been accused of passing it over too slightly. The fact certainly does not rest on the authority of Hoveden, who transcribes these laws *verbatim;* and they are in substance an ancient document. There seems to me somewhat rather suspicious in this assembly of delegates; it looks like a pious fraud to maintain the old Saxon jurisprudence, which was giving way. But even if we admit the fact as here told, I still adhere to the assertion that there is no appearance that these twelve deputies of each county were invested with any higher authority than that of declaring their ancient usages. Any supposition of a real legislative parliament would be inconsistent with all that we know of the state of England under the Conqueror. And what an anomaly, upon every constitutional principle, Anglo-Saxon or Norman, would be a parliament of twelve from each county! Nor is it perfectly manifest that they were chosen by the people; the word *summoneri fecit* is first used; and afterwards, *electis de* (not *in*) *singulis totius patriæ comitatibus.* This might be construed of the king's selection; but perhaps the common interpretation is rather the better.

William, the compiler informs us, having heard some of the Danish laws, was disposed to confirm them in preference to those of England; but yielded to the supplication of the delegates, "omnes compatriotæ, qui leges narravérant," that he would permit them to retain the

customs of their ancestors, imploring him by the soul of King Edward, "cujus erant leges, nec aliorum exterorum." The king at length gave way, by the advice and request of his barons, "consilio et precatu baronum." These of course were Normans; but what inference can be drawn in favour of parliamentary representation in England from the behaviour of the rest? They were supplicants, not legislators.

169.

WRITS OF THE FOURTH AND NINTH YEARS OF HENRY III.

Edit. 1826, vol. iii. p. 20. Edit. 1841, vol. ii. p. 147.

"THE language of these writs implies a distinction between such as were styled barons, apparently including the earls and the four knights who were to come from the several counties 'ad loquendum,' and who were also distinguished from the knights summoned to attend with arms, in performance, it should seem, of the military service due by their respective tenures; and the writs, therefore, apparently distinguished certain tenants-in-chief by knight-service from barons, if the knights so summoned to attend with arms were required to attend by reason of their respective tenures in chief of the king. How the four knights of each county who were thus summoned to confer with the king were to be chosen, whether by the county, or according to the mere will of the sheriff, does not appear; but it seems most probable that they were intended by the king as representatives of the freeholders of each county, and to balance the power of the hostile nobles, who were then leagued against him; and the measure might lead to conciliate the minds of those who would otherwise have had no voice in the legislative assembly." (Report of Lords' Committee, p. 61.)

This would be a remarkable fact, and the motive is by no means improbable, being perhaps that which led to the

large provisions for summoning tenants-in-chief, contained in the charter of John, and afterwards passed over. But this parley of the four knights from each county, for they are only summoned *ad loquendum*, may not amount to bestowing on them any legislative power. It is nevertheless to be remembered that the word parliament meant, by its etymology, nothing more; and the words, *ad loquendum*, may have been used in reference to that. It is probable that these writs were not obeyed; we have no evidence that they were, and it was a season of great confusion, very little before the granting of the charter of Henry III.

170.

WRIT IN THE THIRTY-EIGHTH YEAR OF HENRY III.

Edit. 1826, vol. iii. p. 21. Edit. 1841, vol. ii. p. 147.

"THIS writ tends strongly to show that there then existed no law by which a representation either of the king's tenants *in capite* or of others, for the purpose of constituting a legislative assembly, or for granting an aid, was specially provided; and it seems to have been the first instance appearing on any record now extant, of an attempt to substitute representatives elected by bodies of men for the attendance of the individual so to be represented, personally or by their several procurators, in an assembly convened for the purpose of obtaining an aid." (Report, p. 95.)

171.

STATUTE OF THE TWELFTH OF RICHARD II. c. 12.

Edit. 1826, vol. iii. p. 25. Edit. 1841, vol. ii. p. 150.

This is not accurately expressed, for the statute only says, — "that the said levying be made as it hath been used before this time;" with a provision that if any lord should purchase lands which have been wont to be contributory to wages, they shall continue to be so in his possession.

172.

ELECTORS OF KNIGHTS.

Edit. 1826, vol. iii. p. 29. Edit. 1841, vol. ii. p. 152.

The Lords' Committee, though not very confidently, take the view of Brady and Blackstone, confining the electors of knights to tenants *in capite*. They admit that "the subsequent usage and the subsequent statutes founded on that usage, afford ground for supposing that in the 49th of Henry III. and in the reign of Edward I., the knights of the shires returned to parliament were elected at the county courts and by the suitors of those courts. If the knights of the shires were so elected in the reigns of Henry III. and Edward I., it seems important to discover, if possible, who were the suitors of the county courts in these reigns." (p. 149.). The subject, they are compelled to confess, after a discussion of some length, remains involved in great obscurity, which their industry has been unable to disperse. They had, however, in an earlier part of their report (p. 30.), thought it highly probable that the knights of the shires in the reign of Edward III., represented a description of persons who might in the reign of the Conqueror have been termed barons. And the

general spirit of their subsequent investigation seems to favour this result, though they finally somewhat recede from it, and admit at least that, before the close of Edward III.'s reign, the elective franchise extended to freeholders.

The question, as the committee have stated it, will turn on the character of those who were suitors to the county court. And, if this may be granted, I must own that to my apprehension there is no room for the hypothesis, that the county court was differently constituted in the reign of Edward I. or of Edward III., from what it is at present, and what it was long before those princes sat on the throne. In the Anglo-Saxon period, we find this court composed of thanes, but not exclusively of royal thanes, who were comparatively few. In the laws of Henry I. we still find sufficient evidence that the suitors of the court were all who held freehold lands, *terrarum domini;* or, even if we please to limit this to lords of manors, which is not at all probable, still without distinction of a mesne or immediate tenure. Vavassors, that is, mesne tenants, are particularly mentioned in one enumeration of barons attending the court. In some counties a limitation to tenants *in capite* would have left this important tribunal very deficient in numbers. And as in all our law-books we find the county court composed of freeholders, we may reasonably demand evidence of two changes in its constitution, which the adherents to the theory of restrained representation must combine; one, which excluded all freeholders except those who held immediately of the crown; another which restored them. The notion that the county court was the king's court baron (Report, p. 150.), and thus bore an analogy to that of the lord in every manor, whether it rests on any modern legal authority or not, seems delusive. The court-baron was essentially a feudal institution; the county court was from a different source; it was old Teutonic, and subsisted in this and other countries before the feudal jurisdictions had taken root. It is a serious error to conceive that, because

many great alterations were introduced by the Normans, there was nothing left of the old system of society.*

It may, however, be naturally inquired why, if the king's tenants-in-chief were exclusively members of the national council before the era of county representation, they did not retain that privilege; especially if we conceive, as seems on the whole probable, that the knights chosen in 38 Hen. III. were actually representatives of the military tenants of the crown. The answer might be that these knights do not appear to have been elected in the county court; and when that mode of choosing knights of the shire was adopted, it was but consonant to the increasing spirit of liberty, and to the weight also of the barons, whose tenants crowded the court, that no freeholder should be debarred of his equal suffrage. But this became the more important, and we might almost add necessary, when the feudal aids were replaced by subsidies on movables; so that, unless the mesne freeholders could vote at county elections, they would have been taxed without their consent, and placed in a worse condition than ordinary burgesses. This of itself seems almost a decisive argument to prove that they must have joined in the election of knights of the shire after the *Confirmatio Chartarum*. If we were to go down so late as Richard II., and some pretend that the mesne freeholders did not vote before the reign of Henry IV., we find Chaucer's franklin, a vavassor, capable even of sitting in parliament for his shire. For I do not think Chaucer ignorant of the proper meaning of that word. And Allen says (Edinb.

* A charter of Henry I., published in the new edition of Rymer (i. p. 12.), fully confirms what is here said. "Sciatis quod concedo et præcipio, ut à modo comitatus mei et hundreda in illis locis et iisdem terminis sedeant, sicut sederunt in tempore regis Edwardi, et non aliter. Ego enim, quando voluero, faciam ea satis summoneri propter mea dominica necessaria ad voluntatem meam. Et si modo exurgat placitum de divisione terrarum, si est inter barones meos dominicos, tractetur placitum in curia mea. Et si est inter vavassores duorum dominorum, tractetur in comitatu. Et hoc duello fiat, nisi in eis remanserit. Et volo et præcipio, ut omnes de comitatu eant ad comitatus et hundreda, sicut fecerunt in tempore Regis Edwardi." But it is also easily proved from the Leges Henrici Primi.

Rev. xxviii. 145.)—"In the earliest records of the House of Commons we have found many instances of sub-vassals who have represented their counties in parliament."

If, however, it should be suggested that the practice of admitting the votes of mesne tenants at county elections may have crept in by degrees, partly by the constitutional principle of common consent, partly on account of the broad demarcation of tenants *in capite* by knight's service from barons, which the separation of the houses of parliament produced, thus tending, by diminishing the importance of the former, to bring them down to the level of other freeholders, partly, also, through the operation of the statute *Quia Emptores* (18 Edw. I.) which by putting an end to sub-infeudation, created a new tenant of the crown upon every alienation of land, however partial, by one who was such already, and thus both multiplied their numbers and lowered their dignity; this supposition, though incompatible with the argument built on the nature of the county-court, would be sufficient to explain the facts, provided we do not date the establishment of the new usage too low. The Lords' Committee themselves, after much wavering, come to the conclusion, that "at length, if not always, two persons were elected by all the freeholders of the county, whether holding in chief of the crown or of others." (p. 331.) This they infer from the petitions of the Commons, that the mesne tenants should be charged with the wages of knights of the shire; since it would not be reasonable to levy such wages from those who had no voice in the election. They ultimately incline to the hypothesis, that the change came in silently, favoured by the growing tendency to enlarge the basis of the constitution, and by the operation of the statute *Quia Emptores*, which may not have been of inconsiderable influence. It appears by a petition in 51 Edw. III., that much confusion had arisen with respect to tenures; and it was frequently disputed whether lands were held of the king or of other lords. This question would often turn on the date of alienation; and, in the hurry of an election, the bias being always in favour of an extended suffrage,

it is to be supposed that the sheriff would not reject a claim to vote, which he had not leisure to investigate.

173.

TOWNS BEFORE THE CONQUEST.

Edit. 1826, vol. iii. p. 31. Edit. 1841, vol. ii. p. 154.

IT now appears more probable to me than it did, that some of the greater towns, but almost unquestionably London, did enjoy the right of electing magistrates with a certain jurisdiction before the Conquest. The notion which I found prevailing among the writers of the last century, that the municipal privileges of towns on the Continent were merely derived from charters of the twelfth century, though I was aware of some degree of limitation which it required, swayed me too much in estimating the condition of our own burgesses. And I must fairly admit that I have laid too much stress on the silence of Domesday Book; which, as has been justly pointed out, does not relate to matters of internal government, unless when they involve some rights of property.

I do not conceive, nevertheless, that the municipal government of Anglo-Saxon boroughs was analogous to that generally established in our corporations from the reign of Henry II. and his successors. The real presumption has been acutely indicated by Sir F. Palgrave, arising from the universal institution of the court-leet, which gave to an alderman, or otherwise denominated officer, chosen by the suitors, a jurisdiction, in conjunction with themselves as a jury, over the greater part of civil disputes and criminal accusations, as well as general police, that might arise within the hundred. Wherever the town or borough was too large to be included within a hundred, this would imply a distinct jurisdiction, which may of course be called municipal. It would be similar to that which, till lately, existed in some towns—an elective high bailiff or principal magistrate, without a repre-

sentative body of aldermen and councillors. But this is more distinctly proved with respect to London, which, as is well known, does not appear in Domesday, than as to any other town. It was divided into wards, answering to hundreds in the county; each having its own ward-mote, or leet, under its elected alderman. "The city of London, as well within the walls, as its liberties without the walls, has been divided from time immemorial into wards, bearing nearly the same relation to the city that the hundred anciently did to the shire. Each ward is, for certain purposes, a distinct jurisdiction. The organisation of the existing municipal constitution of the city is, and always has been, as far as can be traced, entirely founded upon the ward system." (Introduction to the French Chronicle of London.—Camden Society, 1844.)

Sir F. Palgrave extends this much farther:—"There were certain districts locally included within the hundreds, which nevertheless constituted independent bodies politic. The burgesses, the tenants, the resiants of the king's burghs and manors in ancient demesne, owed neither suit nor service to the hundred leet. They attended at their own leet, which differed in no essential respect from the leet of the hundred. The principle of frank-pledge required, that each friborg should appear by its head as its representative; and, consequently, the jurymen of the leet of the burgh or manor are usually described under the style of the twelve chief pledges. The legislative and remedial assembly of the burgh or manor, was constituted by the meeting of the heads of its component parts. The port-reeve, constable, head-borough, bailiff, or other the chief executive magistrate, was elected or presented by the leet jury. Offences against the law were repressed by their summary presentments. They who were answerable to the community for the breach of the peace, punished the crime. Responsibility and authority were conjoined. In their legislative capacity they bound their fellow-townsmen by making by-laws." (Edin. Rev. xxxvi. 309.) "Domesday Book," he says afterwards, "does not notice the hundred court, or the county court; because it

was unnecessary to inform the king or his justiciaries of the existence of the tribunals which were in constant action throughout all the land. It was equally unnecessary to make a return of the leets which they knew to be inherent in every burgh. Where any special municipal jurisdiction existed, as in Chester, Stamford, and Lincoln, then it became necessary that the franchise should be recorded. The twelve lagemen in the two latter burghs were probably hereditary aldermen. In London and in Canterbury, aldermen occasionally held their sokes by inheritance.* The negative evidence extorted out of Domesday has, therefore, little weight." (p. 313.)

It seems, however, not unquestionable, whether this representation of an Anglo-Saxon and Anglo-Norman municipality is not urged rather beyond the truth. The port-reeve of London, their principal magistrate, appears to have been appointed by the crown. It was not till 1188, that Henry Fitzalwyn, ancestor of the present Lord Beaumont†, became the first mayor of London. But he also was nominated by the crown, and remained twenty-four years in office. In the same year, the first sheriffs are said to have been made (*facti*). But, John, immediately after his accession, in 1199, granted the citizens leave to choose their own sheriffs. And his charter of 1215, permits them to elect annually their mayor. (Maitland's Hist. of London, pp. 74. 76.) We read, however, under the year 1200, in the ancient chronicle lately published, that twenty-five of the most discreet men of the city were chosen and sworn to advise for the city, together with the mayor. These were evidently different from the aldermen, and are the original common council of the city. They were, perhaps, meant in a later entry (1229): — "Omnes aldermanni et magnates civitatis per assensum universorum civium,"

* See the ensuing part of this note.

† This pedigree is elaborately, and with pious care, traced by Mr. Stapleton, in his excellent introduction to the old chronicle of London, already quoted. The name Alwyn appears rather Saxon than Norman, so that we may presume the first mayor to have been of English descent; but whether he were a merchant, or a landholder living in the city, must be undecided.

who are said to have agreed never to permit a sheriff to remain in office during two consecutive years.

The city and liberties of London were not wholly under the jurisdiction of the several wardmotes and their aldermen. Landholders, secular and ecclesiastical, possessed their exclusive sokes, or jurisdictions, in parts of both. One of these has left its name to the ward of Portsoken. The prior of the Holy Trinity, in right of this district, ranked as an alderman, and held a regular wardmote. The wards of Farringdon are denominated from a family of that name, who held a part of them by hereditary right as their territorial franchise. These sokes gave way so gradually before the power of the citizens, with whom, as may be supposed, a perpetual conflict was maintained, that there were nearly thirty of them in the early part of the reign of Henry III., and upwards of twenty in that of Edward. I. With the exception of Portsoken, they were not commensurate with the city wards, and we find the juries of the wards, in the third of Edward I., presenting the sokes as liberties enjoyed by private persons or ecclesiastical corporations, to the detriment of the crown. But, though the laws of these sokes trenched materially on the exclusive privileges of the city, it is remarkable that, no condition but inhabitancy being required in the thirteenth century for civic franchises, both they and their tenants were citizens, having individually a voice in municipal affairs, though exempt from municipal jurisdiction. I have taken most of this paragraph from a valuable though short notice of the state of London in the thirteenth century, published in the fourth volume of the Archæological Journal (p. 273.), 1847.

The inference which suggests itself from these facts, is, that London, for more than two centuries after the Conquest, was not so exclusively a city of traders, a democratic municipality, as we have been wont to conceive. And as this evidently extends back to the Anglo-Saxon period, it both lessens the improbability that the citizens bore at times a part in political affairs, and exhibits them in a new light, as lords and tenants of lords, as well as

what of course they were in part, engaged in foreign and domestic commerce. It will strike every one, in running over the list of mayors and sheriffs in the thirteenth century, that a large proportion of the names are French; indicating, perhaps, that the territorial proprietors whose sokes were intermingled with the city, had influence enough, through birth and wealth, to obtain an election. The general polity, Saxon and Norman, was aristocratic; whatever infusion there might be of a more popular scheme of government, and much certainly there was, could not resist, even if resistance had been always the people's desire, the joint predominance of rank, riches, military habits, and common alliance, which the great baronage of the realm enjoyed. London, nevertheless, from its populousness, and the usual character of cities, was the centre of a democratic power, which bursting at times into precipitate and needless tumult easily repressed by force, kept on its silent course till, near the end of the thirteenth century, the rights of the citizens and burgesses in the legislature were constitutionally established.

174.

CHARTER OF HENRY I. TO LONDON.

Edit. 1826, vol. iii. p. 33. note *. Edit. 1841, vol. ii. p. 155. note ‡.

IT is said by Mr. Thorpe (Ancient Laws of England, p. 267.), that though there are ten witnesses, he only finds one who throws any light on the date; namely, Hugh Bigod, who succeeded his brother William in 1120. But Mr. Thorpe does not mention in what respect he succeeded. It was as *dapifer regis;* but he is not so named in the charter. (Dugdale's Baronage, p. 132.) The date, therefore, still seems problematical.

175.

LONDON.

Edit. 1826, vol. iii. p. 87. Edit. 1841, vol. ii. p. 158.

A SINGULAR proof of the estimation in which the citizens of London held themselves in the reign of Richard I. occurs in the Chronicle of Jocelyn de Brakelonde (p. 56. — Camden Society, 1840.). They claimed to be free from toll in every part of England, and in every jurisdiction, resting their immunity on the antiquity of London (which was coeval, they said, with Rome), and on its rank as metropolis of the kingdom. "Et dicebant cives Lundonienses fuisse quietos de theloneo in omni foro, et semper et ubique, per totam Angliam, à tempore quo Roma primo fundata fuit, et civitatem Lundoniæ, eodem tempore fundatam, talem habere debere libertatem per totam Angliam, et ratione civitatis privilegiatæ quæ olim metropolis fuit et caput regni, et ratione antquitatis." Palgrave inclines to think that London never formed part of any kingdom of the Heptarchy. (Introduction to Rot. Cur. Regis. p. 95.) But this seems to imply a republican city in the midst of so many royal states, which seems hardly probable, unless the meaning be that London was not parcel of any kingdom, so as to appear in its witenagemot. Certainly it seems strange, though I cannot explain it away, that the capital of England should have fallen, as we generally suppose, to the small and obscure kingdom of Essex. Winchester indeed, may be considered as having become afterwards the capital during the Anglo-Saxon monarchy, so far as that it was for the most part the residence of our kings. But London was always more populous.

176.

POPULATION OF LONDON.

Edit. 1826, vol. iii. p. 38.* Edit. 1841, vol. ii. p. 158.

IF Fitz-Stephen rightly informs us, that in London there were 126 parish churches, besides 13 conventual ones, we may naturally think the population much under-rated at 40,000. But the fashion of building churches in cities was so general, that we cannot apply a standard from modern times. Norwich contained sixty parishes.

Even under Henry II., as we find by Fitz-Stephen, the prelates and nobles had town houses.* "Ad hæc omnes fere episcopi, abbates, et magnates Angliæ, quasi cives et municipes sunt urbis Lundoniæ; sua ibi habentes ædificia præclara; ubi se recipiunt, ubi divites impensas faciunt, ad concilia, ad conventus celebres in urbem evocati, à domino rege vel metropolitano suo, seu propriis tracti negotiis." The eulogy of London by this writer is very curious; its citizens were thus early distinguished by their good eating, to which they added amusements less congenial to later livery-men, hawking, cock-fighting, and much more. The word *cockney* is not improbably derived from *cocayne*, the name of an imaginary land of ease and jollity.

The city of London within the walls was not wholly built, many gardens and open spaces remaining. And the houses were never more than a single story above the ground-floor, according to the uniform type of English dwellings in the twelfth and following centuries. On the other hand, the liberties contained many inhabitants; the streets were narrower than since the fire of 1666; and the vast spaces now occupied by warehouses might have been covered by dwelling-houses. Forty thousand, on the whole, seems rather a low estimate for these two centuries; but it is impossible to go beyond the vaguest conjecture.

* See also the note on p. 31.

The population of Paris in the middle ages has been estimated with as much diversity as that of London. M. Dulaure, on the basis of the *taille* in 1313, reckons the inhabitants at 49,110.* But he seems to have made unwarrantable assumptions where his data were deficient. M. Guérard, on the other hand (Documens Inédits, 1841), after long calculations, brings the population of the city in 1292, to 215,861. This is certainly very much more than we could assign to London, or probably any European city; and, in fact, his estimate goes on two arbitrary postulates. The extent of Paris in that age, which is tolerably known, must be decisive against so high a population.†

The Winton Domesday, in the possession of the Society of Antiquaries of London, furnishes some important information as to that city, which, as well as London, does not appear in the great Domesday Book. This record is of the reign of Henry I. Winchester had been, as is well known, the capital of the Anglo-Saxon kings. It has been observed that "the opulence of the inhabitants may possibly be gathered from the frequent recurrence of the trade of goldsmith in it, and the populousness of the town from the enumeration of the streets." (Cooper's Public Records i. 226.) Of these we find sixteen. "In the petition from the city of Winchester to king Henry VI. in 1450, no less than nine of these streets are mentioned as having been ruined." As York appears to have contained about 10,000 inhabitants under the Confessor, we may probably compute the population of Winchester at nearly twice that number.

* Hist. de Paris, vol. iii. p. 231.

† John of Troyes says, in 1467, that from sixty to eighty thousand men appeared in arms. Dulaure (Hist. de Paris, vol. iii. p. 505.) says this gives 120,000 for the whole population; but it gives double, which is incredible. In the thirteenth and fourteenth centuries the houses were still cottages: only four streets were paved; they were very narrow and dirty, and often inundated by the Seine. (Ib. p. 198.)

177.

STATUTE OF ACTON BURNELL.

Edit. 1826, vol. iii. p. 46. note †. Edit. 1841, vol. ii. p. 164.

"THIS [the trial and judgment of Llewellin] seems to have been the only business transacted at Shrewsbury; for the bishops and abbots, and four knights of each shire, and two representatives of London and nineteen other trading towns, summoned to meet the same day in parliament, are said to have sat at Acton Burnell; and thence the law made for the more easy recovery of the debts of merchants, is called the Statute of Acton Burnell. It was probably made at the request of the representatives of the cities and boroughs present in that parliament, authentic copies in the king's name being sent to seven of those trading towns; but it runs only in the name of the king and his council." (Carte ii. 195. referring to Rot. Wall. 11 Edw. I. m. 2d.)

As the parliament was summoned to meet at Shrewsbury, it may be presumed that the Commons adjourned to Acton Burnell. The word "statute" implies that some consent was given, though the enactment came from the king and council. It is entitled in the Book of the Exchequer — "des Estatus de Slopbury ke sunt appele Actone Burnel. Ces sunt les Estatus fez at Salopsebur, al parlement prochein apres la fete Seint Michel, l'an del reigne le Rey Edward, Fitz le Rey Henry, unzime." (Report of Lords' Committee, p. 191.) The enactment by the king and council founded on the consent of the estates was at Acton Burnell. And the Statute of Merchants, 13 Edw. I., refers to that of the 11th, as made by the king, "a son parlement que il tint à Acton Burnell," and again mentions "l'avant dit statut fait à Acton Burnell." This seems to afford a voucher for what is said in my text, which has been controverted by a learned antiquary.* It

* Archæological Journal, vol. ii. p. 337., by the Rev. W. Hartshorne.

is certain that the lords were at Shrewsbury in their judicial character condemning Llewellin; but whether they proceeded afterwards to Acton Burnell, and joined in the statute, is not quite so clear.

178.

PARLIAMENTS OF EDWARD I.

Edit. 1826, vol. iii. p. 46. Edit. 1841, vol. ii. p. 164.

THE Lords' Committee extenuate the presumption that either knights or burgesses sat in any of these parliaments. The "cunctarum regni civitatum pariter et burgorum potentiores" mentioned by Wikes, in 1269 or 1270, they suppose to have been invited in order to witness the ceremony of translating the body of Edward the Confessor to his tomb newly prepared in Westminster Abbey (p. 161.). It is evident, indeed, that this assembly acted afterwards as a parliament in levying money. But the burgesses are not mentioned in this. It cannot, nevertheless, be presumed from the silence of the historian, who had previously informed us of their presence at Westminster, that they took no part. It may be, perhaps, more doubtful whether they were chosen by their constituents, or merely summoned as "potentiores."

The words of the Statute of Marlbridge (51 Hen. III.) which are repeated in French by that of Gloucester (6 Edw. I.) do not satisfy the committee that there was any representation either of counties or boroughs. "They rather import a selection by the king of the most discreet men of every degree." (p. 183.). And the statutes of 13 Edw. I., referring to this of Gloucester, assert it to have been made by the king, "with prelates, earls, barons, and his council," thus seeming to exclude what would afterwards have been called the lower house. The assembly of 1271, described in the Annals of Waverley, "seems to have been an extraordinary convention, warranted rather by the particular circumstances under which

the country was placed than by any constitutional law." (p. 173.) It was, however, a case of representation; and following several of the like nature, at least as far as counties were concerned, would render the principle familiar. The committee are even unwilling to admit that "la communauté de la terre illocques summons" in the statute of Westminster I., though expressly distinguished from the prelates, earls, and barons, appeared in consequence of election. (p. 173.) But, if not elected, we cannot suppose less than that all the tenants-in-chief, or a large number of them, were summoned; which, after the experience of representation, was hardly a probable course.

The Lords' Committee, I must still incline to think, have gone too far when they come to the conclusion, that on the whole view of the evidence collected on the subject, from the 49th of Hen. III. to the 18th of Edw. I., there seems strong ground for presuming that, after the 49th of Hen. III., the constitution of the legislative assembly returned generally to its old course; that the writs issued in the 49th of Henry III. being a novelty, were not afterwards precisely followed, as far as appears, in any instance; and that the writs issued in the 11th of Edw. I., "for assembling two conventions, at York and Northampton, of knights, citizens, burgesses, and representatives of towns, without prelates, earls, and barons, were an extraordinary measure, probably adopted for the occasion, and never afterwards followed; and that the writs issued in the 18th of Edw. I., for electing two or three knights for each shire without corresponding writs for election of citizens or burgesses, and not directly founded on, or conformable to the writs issued in the 49th of Henry III., were probably adopted for a particular purpose, possibly to sanction one important law [the statute *Quia Emptores*], and because the smaller tenants-in-chief of the crown rarely attended the ordinary legislative assemblies when summoned, or attended in such small numbers that a representation of them by knights chosen for the whole shire was deemed advisable, to give sanction to a law materially affecting

all the tenants-in-chief, and those holding under them." (p. 204.)

The election of two or three knights for the parliament of 18th Edw. I., which I have overlooked in my text, appears by an entry on the close roll of that year, directed to the sheriff of Northumberland; and it is proved from the same roll that similar writs were directed to all the sheriffs in England. We do not find that the citizens and burgesses were present in this parliament; and it is reasonably conjectured that the object of summoning it being to procure a legislative consent to the statute *Quia Emptores*, which put an end to the sub-infeudation of lands, the towns were thought to have little interest in the measure. It is, however, another early precedent for county representation; and that of 22d of Edw. I. (see the writ in p. 53.) is more regular. We do not find, however, that the citizens and burgesses were summoned to either parliament.

But, after the 23d of Edward I., the legislative constitution seems not to have been unquestionably settled, even in the essential point of taxation. The Confirmation of the Charters, in the 25th year of that reign, while it contained a positive declaration that no "aids, tasks, or prises should be levied in future, without assent of the realm," was made in consideration of a grant made by an assembly in which representatives of cities and boroughs do not appear to have been present. Yet, though the words of the charter or statute are prospective, it seems to have long before been reckoned a clear right of the subject, at least by himself, not to be taxed without his consent. A tallage on royal towns and demesnes, nevertheless, was set without authority of parliament four years afterwards. This "seems to show, either that the king's right to tax his demesnes at his pleasure was not intended to be included in the word tallage in that statute [meaning the supposed statute *de tallagio non concedendo*], or that the king acted in contravention of it. But if the king's cities and boroughs were still liable to tallage at the will of the crown, it may not have been deemed inconsistent that they

should be required to send representatives for the purpose of granting a general aid to be assessed on the same cities and boroughs, together with the rest of the kingdom, when such general aid was granted, and yet should be liable to be tallaged at the will of the crown when no such general aid was granted." (p. 244.)

If in these later years of Edward's reign, the king could venture on so strong a measure as the imposition of a tallage without consent of those on whom it was levied, it is less surprising that no representatives of the commons appear to have been summoned to one parliament, or perhaps two, in his twenty-seventh year, when some statutes were enacted. But, as this is merely inferred from the want of any extant writ, which is also the case in some parliaments, where, from other sources, we can trace the commons to have been present, little stress should be laid upon it.

In the remarks which I have offered in these notes on the Report of the Lords' Committee, I have generally abstained from repeating any which Mr. Allen brought forward. But the reader should have recourse to his learned criticism in the Edinburgh Review. It will appear that the committee overlooked not a few important records, both in the reign of Edward I. and that of his son.

179.

BOROUGH REPRESENTATION.

Edit. 1826, vol. iii. p. 49. Edit. 1841, vol. ii. p. 167.

Two considerable authorities have, since the first publication of this Work, placed themselves, one very confidently, one much less so, on the side of our older lawyers, and in favour of the antiquity of borough representation. Mr. Allen, who, in his review of my volumes (Edinb. Rev. xxx. 169.), observes, as to this point, — "We are inclined, in the main, to agree with Mr. Hallam," lets us know, two or three years afterwards, that the scale was tending the

other way; when, in his review of the Report of the Lords' Committee, who give a decided opinion, that cities and boroughs were on no occasion called upon to assist at legislative meetings before the forty-ninth of Henry III., and are much disposed to believe that none were originally summoned to parliament, except cities and boroughs of ancient demesne, or in the hands of the king at the time when they received the summons, he says: — "We are inclined to doubt the first of these propositions, and convinced that the latter is entirely erroneous." (Edinb. Rev. xxxv. 30.) He allows, however, that our kings had no motive to summon their cities and boroughs to the legislature, for the purpose of obtaining money, "this being procured through the justices in eyre, or special commissioners; and, therefore, if summoned at all, it is probable that the citizens and burgesses were assembled on particular occasions only, when their assistance or authority was wanted to confirm or establish the measures in contemplation by the government." But as he alleges no proof that this was ever done, and merely descants on the importance of London and other cities both before and after the Conquest, and as such an occasional summons to a great council, for the purpose of advice, would by no means involve the necessity of legislative consent, we can hardly reckon this very acute writer among the positive advocates of a high antiquity for the commons in parliament.

Sir Francis Palgrave has taken much higher ground, and his theory, in part at least, would have been hailed with applause by the parliaments of Charles I. According to this, we are not to look to feudal principles for our great councils of advice and consent. They were the aggregate of representatives from the courts-leet of each shire and each borough, and elected by the juries to present the grievances of the people, and to suggest their remedies. The assembly summoned by William the Conqueror appears to him not only as it did to Lord Hale, "a sufficient parliament," but a regular one; "proposing the law and giving the initiation to the bill which required

the king's consent." (Ed. Rev. xxxvi. 327.) "We cannot," he proceeds, "discover any essential difference between the powers of these juries and the share of the legislative authority which was enjoyed by the Commons at a period when the constitution assumed a more tangible shape and form." This is supported with that copiousness and variety of illustration which distinguish his theories, even when there hangs over them something not quite satisfactory to a rigorous inquirer, and when their absolute originality on a subject so beaten is of itself reasonably suspicious. Thus we come in a few pages to the conclusion:—"Certainly there is no theory so improbable, so irreconcilable to general history or to the peculiar spirit of our constitution, as the opinions which are held by those who deny the substantial antiquity of the House of Commons. No paradox is so startling as the assumption, that the knights and burgesses who stole into the great council between the close of the reign of John and the beginning of the reign of Edward, should convert themselves at once into the third estate of the realm, and stand before the king and his peers in possession of powers and privileges which the original branches of the legislature could neither dispute nor withstand." (p. 332.) "It must not be forgotten that the researches of all previous writers have been directed wholly in furtherance of the opinions which have been held respecting the feudal origin of parliament. No one has considered it as a common law court."

I do not know that it is necessary to believe in a properly feudal *origin* of parliament, or that this hypothesis is generally received. The great council of the Norman kings was, as in common with Sir F. Palgrave and many others I believe, little else than a continuation of the witenagemot, the immemorial organ of the Anglo-Saxon aristocracy in their relation to the king. It might be composed, perhaps, more strictly according to feudal principles; but the royal thanes had always been consenting parties. Of the representation of courts-leet we may require better evidence: aldermen of London, or persons

bearing that name, perhaps as landowners rather than citizens (see note on p. 31.), may possibly have been occasionally present; but it is remarkable that neither in historians nor records do we find this mentioned; that aldermen, in the municipal sense, are never enumerated among the constituents of a witenagemot or a council, though they must, on the representative theory, have composed a large portion of both. But, waving this hypothesis, which the author seems not here to insist upon, though he returns to it in the Rise and Progress of the English Commonwealth, why is it "a startling paradox to deny the substantial antiquity of the House of Commons?" By this I understand him to mean, that representatives from counties and boroughs came regularly, or at least frequently, to the great councils of Saxon and Norman kings. Their indispensable consent in legislation I do not apprehend him to affirm, but rather the reverse:—"The supposition that in any early period the burgesses had a voice in the solemn acts of the legislature is untenable." (Rise and Progress, &c., i. 314.) But they certainly did, at one time or other, obtain this right, "or convert themselves" as he expresses it, "into the third estate of the realm;" so that upon any hypothesis a great constitutional change was wrought in the powers of the Commons. The revolutionary character of Montfort's parliament in the 49th of Hen. III. would sufficiently account, both for the appearance of representatives from a democracy so favourable to that bold reformer, and for the equality of power with which it was probably designed to invest them. But whether in the more peaceable times of Edward I., the citizens or burgesses were recognised as essential parties to every legislative measure, may, as I have shown, be open to much doubt.

I cannot upon the whole overcome the argument from the silence of all historians, from the deficiency of all proof as to any presence of citizens and burgesses, in a representative character, as a House of Commons before the 49th year of Henry III.; because after this time historians and chroniclers exactly of the same character as

the former, or even less copious and valuable, do not omit to mention it. We are accustomed, in the sister kingdoms, so to speak, of the Continent, founded on the same Teutonic original, to argue against the existence of representative councils or other institutions, from the same absence of positive testimony. No one believes that the three estates of France were called together before the time of Philip the Fair. No one strains the representation of cities in the cortes of Castile beyond the date at which we discover its existence by testimony. It is true that unreasonable inferences may be made from what is usually called negative evidence; but how readily and how often are we deceived by a reliance on testimony! In many instances, the negative conclusion carries with it a conviction equal to a great mass of affirmative proof. And such I reckon the inference from the language of Roger Hoveden, of Matthew Paris, and so many more who speak of councils and parliaments full of prelates and nobles, without a syllable of the burgesses. Either they were absent, or they were too insignificant to be named; and in that case it is hard to perceive any motive for requiring their attendance.

180.

ANNUAL PARLIAMENTS.

Edit. 1826, vol. iii. p. 57. Edit. 1841, vol. ii. p. 171.

IT has been observed that this provision "had probably in view the administration of justice by the king's court in parliament." (Report of L. C. p. 301.) And in another place:—"It is clear that the word parliament in the reign of Edward I. was not used only to describe a legislative assembly, but was the common appellation of the ordinary assembly of the king's great court or council; and that the legislative assembly of the realm, composed generally, in and after the 23d of Edward I., of lords spiritual and temporal, and representatives of the commons, was usually

convened to meet the king's council in one of these parliaments." (p. 171.)

Certainly the commons could not desire to have an annual parliament in order to make new statutes, much less to grant subsidies. It was, however, important to present their petitions, and to set forth their grievances to this high court. We may easily reconcile the anxiety so often expressed by the commons to have frequent sessions of parliament, with the individual reluctance of members to attend. A few active men procured these petitions, which the majority could not with decency oppose, since the public benefit was generally admitted. But when the writs came down, every pretext was commonly made use of to avoid a troublesome and ill-remunerated journey to Westminster. For the subject of annual parliaments see a valuable article by Allen in the 28th volume of the Edinburgh Review.

181.

LORDS ORDAINERS IN 1309.

Edit. 1826, vol. iii. p. 61. Edit. 1841, vol. ii. p. 173.

THE Lords' Committee "have found no evidence of any writ issued for election of knights, citizens, and burgesses to attend the same meetings; from the subsequent documents it seems probable that none were issued, and that the parliament which assembled at Westminster consisted only of prelates, earls, and barons." (p. 259.) We have no record of this parliament; but in that of 5 Edw. II., it is recited—"Come le seizieme jour de Marz l'an de notre regne tierce, a l'honeur de Dieu et pour le bien de nous et de nostre roiaume, eussions granté de notre franche volonté par nos lettres ouvertes aux prelatz, countes, et barons, *et communes de dit roiaume*, qu'ils puissent eslire certain persones des prelatz, comtes, et barons," &c. (Rot. Parl. i. 281.) The inference therefore of the committee seems erroneous.

182.

PARLIAMENTS OF EDWARD II.

Edit. 1826, vol. iii. p. 62. Edit. 1841, vol. ii. p. 173.

THE Lords' Committee dwell much on an enactment in the parliament held at York in 15 Edw. II. (1322), which they conceived to be the first express recognition of the constitutional powers of the lower house. It was there enacted, that "for ever thereafter all manner of ordinances or provisions made by the subjects of the king or his heirs, by any power or authority whatsoever, concerning the royal power of the king or his heirs or against the estate of the crown, should be void and of no avail or force whatsoever; but the matters to be established for the estate of the king and of his heirs, and for the estate of the realm and of the people, should be treated, accorded, and established in parliament, by the king, and by the assent of the prelates, earls, and barons, and the commonalty of the realm, according as had been before accustomed. This proceeding, therefore, declared the legislative authority to reside only in the king, with the assent of the prelates, earls, and barons, and commons assembled in parliament; and that every legislative act not done by that authority should be deemed void and of no effect. By whatever violence this statute may have been obtained, it declared the constitutional law of the realm on this important subject." (p. 282.) The violence, if resistance to the usurpation of a subject is to be called such, was on the part of the king, who had just sent the earl of Lancaster to the scaffold, and the present enactment was levelled at the ordinances which had been forced upon the crown by his faction. The Lords Ordainers, nevertheless, had been appointed with consent of the commons, as has been mentioned in the text; so that this provision in 15 Edw. II. seems rather to limit than to enhance the su-

preme power of parliament, if it were meant to prohibit any future enactment of the same kind by its sole authority. But the statute is declaratory in its nature; nor can we any more doubt that the legislative authority was reposed in the king, lords, and commons before this era, than that it was so ever afterwards. Unsteady as the constitutional usage had been through the reign of Edward I., and willing as both he and his son may have been to prevent its complete establishment, the necessity of parliamentary consent, both for levying money and enacting laws, must have become an article of the public creed before his death. If it be true, that even after this declaratory statute, laws were made without the assent or presence of the commons, as the Lords' Committee incline to hold (pp. 285, 286, 287.), it was undeniably an irregular and unconstitutional proceeding; but this can only show that we ought to be very slow in presuming earlier proceedings of the same nature to have been more conformable to the spirit of the existing constitution. The Lords' Committee too often reason from the fact to the right, as well as from the words to the fact; both are fallacious, and betray them into some vacillation and perplexity. They do not, however, question, on the whole, but that a new constitution of the legislative assemblies of the realm had been introduced before the 15th year of Edward II., and that "the practice had prevailed so long before as to give it, in the opinion of the parliament then assembled, the force and effect of a custom, which the parliament declared should thereafter be considered as established law." (p. 293.) This appears to me rather an inadequate exposition of the public spirit, of the tendency towards enlarging the basis of the constitution, to which the "practice and custom" owed its origin; but the positive facts are truly stated.

The second case in my text, relating to the pretended assent of the commonalty to the election of Prince Edward as guardian of the realm, ought not to have been mentioned as parliamentary, since it had no relation to any proceedings in parliament. It is only material in the

light of testimony to the importance of the commons in general.

It is said in the text, that the assent of the commons frequently does not appear in the statutes of this reign. This might lead a reader to believe, that it only occurs in the few cases mentioned. But it is distinctly specified in Stat. 7 Edw. II. and in 12 Edw. II., and equivalent words are found in other statutes. Though often wanting, the testimony to the constitution of parliament is decisive.

183.

TALLAGES ON KING'S DEMESNES.

Edit. 1826, vol. iii. p. 63. Edit. 1841, vol. ii. p. 175.

THE Lords' Committee observe on this passage in the roll of parliament, that "the king's right to tallage his cities, boroughs, and demesnes, seems not to have been questioned by the parliament, though the commissions for setting the tallage were objected to." (p. 305.) But how can we believe that after the representatives of these cities and boroughs had sat, at least at times, for two reigns, and after the explicit renunciation of all right of tallage by Edward I. (for it was never pretended that the king could lay a tallage on any towns which did not hold of himself), there could have been a parliament which "did not question" the legality of a tallage set without their consent? The silence of the rolls of parliament would furnish but a poor argument. But in fact their language is expressive enough. The several ranks of lords and commons grant the fifteenth penny from the commonalty, and the tenth from the cities, boroughs, and demesnes of the king, "that our lord the king may live of his own, and pay for his expenses, and not aggrieve his people by excessive (outraiouses) prises, or otherwise." And upon this the king revokes the commission in the words of the text. Can any thing be clearer than that the parliament, though in a much gentler tone than they came afterwards

to assume, intimate the illegality of the late tallage? As to any other objection to the commissions, which the committee suppose to have been taken, nothing appears on the roll.

184.

COUNCIL OF THE TWENTY-SEVENTH YEAR OF EDWARD III.

Edit. 1826, vol. iii. p. 74. Edit. 1841, vol. ii. p. 182.

IT should have been less ambiguously expressed; two citizens and burgesses were returned, though only one knight. (Rot. Parl. ii. 206.)

185.

REPEAL OF XV. EDWARD III.

Edit. 1826, vol. iii. p. 77. Edit. 1841, vol. ii. p. 184.

THE Commons in the 17th of Edw. III., petition that the statutes made two years before be maintained in their force, having granted for them the subsidies which they enumerate, "which was a great spoiling (rançon), and grievous charge for them." But the king answered, that "perceiving the said statute to be against his oath, and to the blemish of his crown and royalty, and against the law of the land in many points, he had repealed it. But he would have the articles of the said statute examined, and what should be found honourable and profitable to the king and his people put into a new statute, and observed in future." (Rot. Parl. ii. 139.) But though this is inserted among the petitions, it appears from the roll a little before (p. 139. n. 23.), that the statute was actually repealed by common consent; such consent at least being recited, whether truly or not.

186.

ELECTORS IN BOROUGHS.

Edit. 1826, vol. iii. p. 174. Edit. 1841, vol. ii. p. 248.

MR. ALLEN, than whom no one of equal learning was ever less inclined to depreciate popular rights, inclines more than we should expect to the school of Brady in this point. "There is reason to believe that originally the right of election in boroughs was vested in the governing part of these communities, or in a select portion of the burgesses; and that in the progress of the House of Commons to power and importance, the tendency has been in general to render the elections more popular. It is certain that for many years burgesses were elected in the county courts, and apparently by delegates from the boroughs, who were authorised by their fellow-burgesses to elect representatives for them in parliament. In the reigns of James I. and Charles I., when popular principles were in their greatest vigour, there was a strong disposition in the House of Commons to extend the right of suffrage in boroughs, and in many instances these efforts were crowned with success." (Edin. Rev. xxviii. 145.) But an election by delegates chosen for that purpose by the burgesses at large, is very different from one by the governing part of the community. Even in the latter case, however, this part had generally been chosen, at a greater or less interval of time, by the entire body. Sometimes, indeed, corporations fell into self-election and became close.

187.

PEERAGE BY BARONY.*

Edit. 1826, vol. iii. p. 181. Edit. 1841, vol. ii. p. 252.

WRITS are addressed in 11th of Edw. II.—"comitibus, maribus baronibus, et prælatis," whence the Lords' Committee infer that the style used in John's charter was still preserved. (Report, p. 277.) And though in those times there might be much irregularity in issuing writs of summons, the term "majores barones" must have had an application to definite persons. Of the irregularity we may judge by the fact that under Edward I. about eighty were generally summoned; under his son, never so many as fifty, sometimes less than forty, as may be seen in Dugdale's Summonitiones ad Parliamentum. The committee endeavour to draw an inference from this against a subsisting right of tenure. But if it is meant that the king had an acknowledged prerogative of omitting any baron at his discretion, the higher English nobility must have lost its notorious privileges, sanctioned by long usage, by the analogy of all feudal governments, and by the charter of John, which, though not renewed in terms, nor intended to be retained in favour of the lesser barons, or tenants *in capite*, could not, relatively to the rights of the superior order, have been designedly relinquished.

The committee wish to get rid of tenure as conferring a right to summons; they also strongly doubt whether the summons conferred an hereditary nobility; but they assert, that in the 15th of Edw. III. "those who may have been deemed to have been in the reign of John distinguished as *majores barones*, by the honour of a personal writ of summons, or by the extent and influence of their property, from the other tenants-in-chief of the crown, were now clearly become, with the earls and the newly created dignity of duke, a distinct body of men de-

* See note 166.

nominated peers of the land, and having distinct personal rights; while the other tenants-in-chief, whatsoever their rights may have been in the reign of John, sunk into the general mass." (p. 314.)

The appellation, "peers of the land," is said to occur for the first time in 14 Edw. II. (p. 281.), and we find them very distinctly in the proceedings against Bereford and others at the beginning of the next reign.* They were, of course, entitled to trial by their own order. But whether all laymen, summoned by particular writs to parliament, were at that time considered as peers, and triable by the rest as such, must be questionable, unless we could assume that the writ of summons already ennobled the blood, which is at least not the opinion of the committee. If, therefore, the writ did not constitute an hereditary peer, nor tenure in chief by barony give a right to sit in parliament, we should have a difficulty in finding any determinate estate of nobility at all, exclusive of earls, who were, at all times and without exception, indisputably noble; an hypothesis manifestly paradoxical, and contradicted by history and law. If it be said, that prescription was the only title, this may be so far granted, that the *majores barones* had by prescription, antecedent to any statute or charter, been summoned to parliament; but this prescription would not be broken by the omission, through negligence or policy, of an individual tenant by barony in a few parliaments. The prescription was properly in favour of the class, the *majores barones* generally, and as to them it was perfect, extending itself in right, if not always in fact, to every one who came within its scope.

In the Third Report of the Lords' Committee, apparently drawn by the same hand as the Second, they "conjecture that after the establishment of the Commons' House of parliament, as a body by election, separate and distinct from the lords, all idea of a right to a writ of summons to parliament by reason of tenure had ceased, and that the dignity of baron, if not conferred by patent, was considered as derived only from the king's writ of summons." (Third

* See p. 181. (253.) note †.

Report, p. 226.) Yet they have not only found many cases of persons summoned by writ several times, whose descendants have not been summoned, and hesitate even to approve the decision of the House on the Clifton barony in 1673, when it was determined that the claimant's ancestor, by writ of summons and sitting in parliament, was a peer, but doubt whether "even at this day, the doctrine of that case ought to be considered as generally applicable, or may be limited by time and circumstances." * (p. 33.)

It seems, with much deference to more learned investigators, rather improbable that, either before or after the regular admission of the knights and burgesses by representation, and consequently the constitution of a distinct lords' house of parliament, a writ of summons could have been lawfully withheld at the king's pleasure from any one holding such lands by barony, as rendered him notoriously one of the *majores barones*. Nor will this be much affected by arguments from the inexpediency, or supposed anomaly, of permitting the right of sitting as a peer of parliament to be transferred by alienation. The Lords' Committee dwell at length upon them. And it is true that, in our original feudal constitution, the fiefs of the crown could not be alienated without its consent. But when this was obtained, when a barony had passed by purchase, it would naturally draw with it, as an incident of tenure, the privilege of being summoned to parliament, or, in language more accustomed in those times, the obligation of doing suit and service to the king in his high court. Nor was the alienee, doubtless, to be taxed with-

* This doubt was soon afterwards changed into a proposition, strenuously maintained by the supposed compiler of these Reports, Lord Redesdale, on the claim to the barony of L'Isle in 1829. The ancestor had been called by writ to several parliaments of Edward III.; and having only a daughter, the negative argument from the omission of his posterity, is of little value; for though the husbands of heiresses were occasionally summoned, this does not seem to have been an universal practice. It was held by Lord Redesdale, that, at least until the statute of 5 Richard II. c. 4., no hereditary or even personal right to the peerage was created by the writ of summons. The House of Lords rejected the claim, though the language of their resolution is not conclusive as to the principle. The opinion of Lord R. has been ably impugned by Sir Harris Nicolas, in his Report of the L'Isle Peerage, 1829.

out his own consent, any more than another tenant *in capite*. What incongruity, therefore, is there in the supposition, that after tenants in fee simple acquired by statute the power of alienation without previous consent of the crown, the new purchaser stood on the same footing in all other respects as before the statute? It is also much to be observed, that the claim to a summons might be gained by some methods of purchase, using that word, of course, in the legal sense. Thus the husbands of heiresses of baronies were frequently summoned, and sat as tenants by curtesy after the wife's death; though it must be owned that the committee doubt, in their Third Report (p. 47.), whether tenancy by curtesy of a dignity was ever allowed as a right. Thus, too, every estate created in tail male was a diversion of the inheritance by the owner's sole will from its course according to law. Yet in the case of the barony of Abergavenny, even so late as the reign of James I., the heir male, being in seisin of the lands, was called by writ as baron, to the exclusion of the heir general. Surely this was an authentic recognition, not only of baronial tenure as the foundation of a right to sit in parliament, but of its alienability by the tenant.*

If it be asked whether the posterity of a baron aliening the lands which gave him a right to be summoned to the king's court, would be entitled to the privileges of peerage by nobility of blood, it is true that, according to Collins, whose opinion the committee incline to follow, there are instances of persons in such circumstances being summoned. But this seems not to prove any thing to the purpose. The king, no one doubts, from the time of Edward I., used to summon by writ many who had no baronial tenure; and the circumstance of having alienated a barony could not render any one incapable of attending

* The Lords' Committee (Second Report, p. 436.) endeavour to elude the force of this authority; but it manifestly appears that the Nevilles were preferred to the Fanes for the particular barony in question; though some satisfaction was made to the claimant of the latter family, by calling her to a different peerage.

parliament by a different title. It is very hard to determine any question as to times of much irregularity; but it seems that the posterity of one who had parted with his baronial lands, would not, in those early times, as a matter of course, remain noble. A right by tenure seems to exclude a right by blood; not necessarily, because two collateral titles may co-exist, but in the principle of the constitution. A feudal principle was surely the more ancient; and what could be more alien to this than a baron, a peer, an hereditary counsellor, without a fief? Nobility, that is, gentility of birth, might be testified by a pedigree or a bearing; but a peer was to be in arms for the crown, to grant his own money as well as that of others, to lead his vassals, to advise, to exhort, to restrain the sovereign. The new theory came in by degrees, but in the decay of every feudal idea; it was the substitution of a different pride of aristocracy for that of baronial wealth and power; a pride nourished by heralds, more peaceable, more indolent, more accommodated to the rules of fixed law and vigorous monarchy. It is difficult to trace the progress of this theory, which rested on nobility of blood, but yet so remarkably modified by the original principle of tenure, that the privileges of this nobility were ever confined to the actual possessor, and did not take his kindred out of the class of commoners. This sufficiently demonstrates that the phrase is, so to say, catachrestic, not used in a proper sense; inasmuch as the actual seisin of the peerage as an hereditament, whether by writ or by patent, is as much requisite at present for nobility, as the seisin of an estate by barony was in the reign of Henry III.

Tenure by barony appears to have been recognised by the House of Lords in the reign of Henry VI., when the earldom of Arundel was claimed as annexed to the "castle, honour, and lordship aforesaid." The Lords' Committee have elaborately disproved the allegations of descent and tenure, on which this claim was allowed. (Second Report, pp. 406—426.) But all with which we are concerned is the decision of the crown and of the

house in the 11th year of Henry VI., whether it were right or wrong as to the particular facts of the case. And here we find that the king, by the advice and assent of the lords, "considering that Richard Fitzalan, &c., was seised of the castle, honour, and lordship in fee; and by reason of his possession thereof, without any other reason or creation, was earl of Arundel, and held the name, style, and honour of earl of Arundel, and the place and seat of earl of Arundel in parliament and councils of the king," &c., admits him to the same seat and place as his ancestors, earls of Arundel, had held. This was long afterwards confirmed by act of parliament (3 Car. I.), reciting the dignity of earl of Arundel to be real and local, &c., and settling the title on certain persons in tail, with provisions against alienation of the castle and honour. This appears to establish a tenure by barony in Arundel, as a recent determination had done in Abergavenny. Arundel was a very peculiar instance of an earldom by tenure. For we cannot doubt that all earls were peers of parliament by virtue of that rank, though, in fact, all held extensive lands of the crown. But in 1669, a new doctrine, which probably had long been floating among lawyers and in the House of Lords, was laid down by the king in council on a claim to the title of Fitzwalter. The nature of a barony by tenure having been discussed, it was found "to have been discontinued for many ages, and not in being" (a proposition not very tenable, if we look at the Abergavenny case, even setting aside that of Arundel as peculiar in its character, and as settled by statute); "and so not fit to be received, or to admit any pretence of right to succession thereto." It is fair to observe, that some eminent judges were present on this occasion. The committee justly say, that "this decision" (which, after all, was not in the House of Lords) "may perhaps be considered as amounting to a solemn opinion that, although in early times the right to a writ of summons to parliament as a baron may have been founded on tenure, a contrary practice had prevailed for ages, and that, therefore, it was not to be taken as then forming part of the consti-

tutional law of the land." (p. 446.) Thus ended barony by tenure. The final decision, for such it has been considered, and recent attempts to revive the ancient doctrine have been defeated, has prevented many tedious investigations of claims to baronial descent, and of alienations in times long past. For it could not be pretended that every fraction of a barony gave a right to summons; and, on the other hand, alienations of parcels, and descents to coparceners, must have been common, and sometimes difficult to disprove. It was held, indeed, by some, that the *caput baroniæ*, or principal lordship, contained, as it were, the vital principle of the peerage, and that its owner was the true baron; but this assumption seems uncertain.

It is not very easy to reconcile this peremptory denial of peerage by tenure, with the proviso in the recent statute, taking away tenure by knight's service, and, inasmuch as it converts all tenure into socage, that also by barony, "that this act shall not infringe or hurt any title of honour, feudal or other, by which any person hath or may have right to sit in the Lords' House of Parliament, as to his or their title of honour, or sitting in parliament, and the privilege belonging to them as peers." (Stat. 12 Car. 2. c. 24. s. 11.)

Surely this clause was designed to preserve the incident to baronial tenure, the privilege of being summoned to parliament, while it destroyed its original root, the tenure itself. The privy-council, in their decision on the Fitzwalter claim, did not allude to this statute, probably on account of the above proviso, and seem to argue that if tenure by barony was no longer in being, the privilege attached to it must have been extinguished also. It is, however, observable that tenure by barony is not taken away by the statute, except by implication. No act indeed can be more loosely drawn than this, which was to change essentially the condition of landed property throughout the kingdom. It literally abolishes all tenure *in capite*; though this is the basis of the crown's right to escheat, and though lands in common socage, which the act with a strange confusion opposes to socage *in capite*, were

as much holden of the king or other lord as those by knight's service. Whether it was intended by the silence about tenure by barony to pass it over as obsolete, or this arose from negligence alone, it cannot be doubted that the proviso preserving the right of sitting in parliament by a feudal honour, was introduced in order to save that privilege, as well for Arundel and Abergavenny as for any other that might be entitled to it.*

188.

Edit. 1826, vol. iii. p. 184. note. † Edit. 1841, vol. ii. p. 255. note †.

THIS speculative question is idly put, and in forgetfulness of the determinations of the House of Lords and of the statute converting all tenures into socage. The case of R. v. Knowles, which related to a peerage by patent, is not to the purpose.

189.

PEERAGES BY WRIT.

Edit. 1826, vol. iii. p. 187. Edit. 1841, vol. ii. p. 257.

IT seems to have been admitted by Lord Redesdale, in the case of the barony of L'Isle, that a writ of summons, with sufficient proof of having sat by virtue of it in the House

* The continuance of barony by tenure has been controverted by Sir Harris Nicolas, in some remarks on such a claim preferred by the present Earl Fitzharding while yet a commoner, in virtue of the possession of Berkeley Castle, published as an Appendix to his Report of the L'Isle Peerage. In the particular case there seem to have been several difficulties, independently of the great one, that, in the reign of Charles II., barony by tenure had been finally condemned. But there is surely a great general difficulty in the hypothesis that, while it is acknowledged that there were, in the reigns of Edward I. and Edward II., certain known persons holding by barony and called peers of the realm, it could have been agreeable to the feudal or to the English constitution, that the king, by refusing to the posterity of such barons a writ of summons to parliament, might deprive them of their nobility, and reduce them for ever to the rank of commoners.

of Lords, did in fact create an hereditary peerage from the fifth year of Richard II., though he resisted this with respect to claimants who could only deduce their pedigree from an ancestor summoned by one of the three Edwards. (Nicolas's Case of Barony of L'Isle, p. 200.) The theory, therefore, of West, which I have followed in the text, and which denies peerage by writ even to those summoned in several later reigns, must be taken with limitation. "I am informed," it is said by Mr. Hart, *arguendo*, "that every person whose name appears in the writ of summons of 5 Ric. II. was again summoned to the following parliament, and their posterity have sat in parliament as peers." (p. 233.)

190.

BANNERETS.

Edit. 1826, vol. iii. p. 188. Edit. 1841, vol. ii. p. 257.

THE Lords' Committee do not like, apparently, to admit that bannerets were summoned to the House of Lords, as a distinct class of peers. "It is observable," they say, "that this statute (5 Ric. II. c. 4.) speaks of bannerets as well as of dukes, earls, and barons, as persons bound to attend the parliament; but it does not follow that banneret was then considered as a name of dignity distinct from that honourable knighthood under the king's banner in the field of battle, to which precedence of all other knights was attributed." (p. 342.) But did the committee really believe, that all the bannerets of whom we read in the reigns of Richard II. and afterwards, had been knighted at Crecy and Poictiers? The name is only found in parliamentary proceedings, during comparatively pacific times.

191.

COUNCIL OF ADVICE.

Edit. 1826, vol. iii. p. 206. Edit. 1841, vol. ii. p. 269.

THE words "privy council" are said not to be used till after the reign of Henry VI.; the former style was "ordinary" or "continual council." But a distinction had always been made, according to the nature of the business; the great officers of state, or, as we might now say, the ministers, had no occasion for the presence of judges or any lawyers in the secret councils of the crown. They become, therefore, a council of government, though always members of the *consilium ordinarium;* and, in the former capacity, began to keep formal records of their proceedings. The acts of this council, though, as I have just said, it bore as yet no distinguishing name, are extant from the year 1386, and for seventy years afterwards are known through the valuable publication of Sir Harris Nicolas.

192.

COURT OF CHANCERY.

Edit. 1826, vol. iii. p. 211. Edit. 1841, vol. ii. p. 272.

THE equitable jurisdiction of the Court of Chancery has been lately traced, in some respects, though not for the special purpose mentioned in the text, higher than the reign of Richard II. This great minister of the crown, as he was at least from the time of the Conquest*, always

* It has been doubted, notwithstanding the authority of Spelman, and some earlier but rather precarious testimony, whether the chancellor before the Conquest was any more than a scribe or secretary. (Palgrave, in the Quarterly Review, xxxiv. 291.) The Anglo-Saxon charters, as far as I have observed, never mention him as a witness; which seems a very strong circumstance. Ingulfus, indeed, has given a pompous account of Chancellor Turketul; and, if the history ascribed to Ingulfus be genuine, the office must have been of high dignity. Lord Campbell assumes this in his Lives of the Chancellors.

till the reign of Edward III., an ecclesiastic of high dignity, and honourably distinguished as the keeper of the king's conscience, was peculiarly intrusted with the duty of redressing the grievances of the subject, both when they sprung from misconduct of the government, through its subordinate officers, and when the injury had been inflicted by powerful oppressors. He seems generally to have been the chief or president of the council, when it exerted that jurisdiction which we have been sketching in the text, and which will be the subject of another note. But he is more prominent when presiding in a separate tribunal as a single judge.

The Court of Chancery is not distinctly to be traced under Henry III. For a passage in Matthew Paris, who says of Radulfus de Nevil—"Erat regis fidelissimus cancellarius, et inconcussa columna veritatis, singulis sua jura, præcipue pauperibus, justè reddens et indilatè," may be construed of his judicial conduct in the council. This province naturally, however, led to a separation of the two powers. And in the reign of Edward I. we find the king sending certain of the petitions addressed to him, praying extraordinary remedies, to the chancellor and master of the rolls, or to either separately, by writ under the privy seal, which was the usual mode by which the king delegated the exercise of his prerogative to his council, directing them to give such remedy as should appear to be consonant to honesty (or equity, *honestati*). "There is reason to believe," says Mr. Spence (Equitable Jurisdiction, p. 335.), "that this was not a novelty." But I do not know upon what grounds this is believed. Writs, both those of course and others, issued from Chancery in the same reign. (Palgrave's Essay on King's Council, p. 15.) Lord Campbell has given a few specimens of petitions to the council, and answers endorsed upon them, in the reign of Edward I., communicated to him by Mr. Hardy from the records of the Tower. In all these the petitions are referred to the chancellor for justice. The entry, at least as given by Lord Campbell, is commonly so short that

we cannot always determine whether the petition was on account of wrongs by the crown or others. The following is rather more clear than the rest:—"18 Edw. I. The king's tenants of Aulton complain that Adam Gordon ejected them from their pasture, contrary to the tenor of the king's writ. Resp. Veniant partes coram cancellario, et ostendat ei Adam quare ipsos ejecit, et fiat iis justitia." Another is a petition concerning concealment of dower, for which, perhaps, there was no legal remedy.

In the reign of Edward II. the peculiar jurisdiction of the chancellor was still more distinctly marked. "From petitions and answers lately discovered, it appears that during this reign the jurisdiction of the Court of Chancery was considerably extended, as the "consuetudo cancellariæ" is often familiarly mentioned. We find petitions referred to the chancellor in his court, either separately, or in conjunction with the king's justices, or the king's serjeants; on disputes respecting the wardship of infants, partition, dower, rent-charges, tithes, and goods of felons. The chancellor was in full possession of his jurisdiction over charities, and he superintended the conduct of coroners. Mere wrongs, such as malicious prosecutions and trespasses to personal property, are sometimes the subject of proceedings before him; but I apprehend that those were cases where, from powerful combinations and confederacies, redress could not be obtained in the courts of common law." (Lives of Chanc. vol. i. p. 204.)

Lord Campbell, still with materials furnished by Mr. Hardy, has given not less than thirty-eight entries during the reign of Edward II., where the petition, though sometimes directed to the council, is referred to the chancellor for determination. One only of these, so far as we can judge from their very brief expression, implies any thing of an equitable jurisdiction. It is again a case of dower; and the claimant is remitted to the Chancery; "et fiat sibi ibidem justitia, quia non potest juvari per communem legem per breve de dote." This case is in the Rolls of Parliament (i. 340.), and had been previously mentioned

by Mr. Bruce in a learned memoir on the Court of Star-Chamber. (Archæologia, xxv. 345.) It is difficult to say whether this fell within the modern rules of equity, but the general principle is evidently the same.

Another petition is from the commonalty of Suffolk to the council, complaining of false indictments and presentments in courts leet. It is answered:—"Si quis sequi voluerit adversus falsos indicatores et procuratores de falsis indictamentis, sequatur in Cancell. et habebit remedium consequens." Several other entries in this list are illustrative of the jurisdiction appertaining, in fact at least, to the council and the chancellor; and being of so early a reign, form a valuable accession to those which later records have furnished to Sir Matthew Hale and others.

The Court of Chancery began to decide causes as a court of equity, according to Mr. Hardy, in the reign of Edward III., probably about 22 Edw. III. (Introduction to Close Rolls, p. 28.) Lord Campbell would carry this jurisdiction higher; and the instances already mentioned may be sufficient just to prove that it had begun to exist. It certainly seems no unnatural supposition that the great principle of doing justice, by which the council and the chancellor professed to guide their exercise of judicature, may have led them to grant relief in some of those numerous instances where the common law was defective or its rules too technical and unbending. But, as has been observed, the actual entries, as far as quoted, do not afford many precedents of equity. Mr. Hardy, indeed, suggests (p. 25.), that the *Curia Regis* in the Norman period proceeded on equitable principles; and that this led to the removal of plaints into it from the county-court. This is, perhaps, not what we should naturally presume. The subtle and technical spirit of the Norman lawyers is precisely that which leads, in legal procedure, to definite and unbending rules; while in the lower courts, where Anglo-Saxon thanes had ever judged by the broad rules of justice, according to the circumstances of the case, rather than a strict line of law which did not yet exist,

we might expect to find all the uncertainty and inconsistency which belongs to a system of equity, until, as in England, it has acquired, by length of time, the uniformity of law, but none at least of the technicality so characteristic of our Norman common law, and by which the great object of judicial proceedings was so continually defeated. This, therefore, does not seem to me a probable cause of the removal of suits from the county-court or court-baron to those of Westminster. The true reason, as I have observed in another place, was the partiality of these local tribunals. And the expense of trying a suit before the justices in eyre might not be very much greater than in the county-court.

I conceive, therefore, that the three supreme courts at Westminster proceeded upon those rules of strict law which they had chiefly themselves established; and this from the date of their separation from the original *Curia Regis*. But whether the king's council may have given more extensive remedies than the common law afforded, as early at least as the reign of Henry III., is what we are not competent, apparently, to affirm or deny. We are at present only concerned with the Court of Chancery. And it will be interesting to quote the deliberate opinion of a late distinguished writer, who has taken a different view of the subject from any of his predecessors.

"After much deliberation," says Lord Campbell, "I must express my clear conviction, that the chancellor's equitable jurisdiction is as indubitable and as ancient as his common-law jurisdiction, and that it may be traced in a manner equally satisfactory. The silence of Bracton, Glanvil, Fleta, and other early juridical writers, has been strongly relied upon to disprove the equitable jurisdiction of the chancellor; but they as little notice his common-law jurisdiction, most of them writing during the subsistence of the *Aula Regia;* and they all speak of the Chancery, not as a court, but merely as an office for the making and sealing of writs. There are no very early decisions of the chancellors on points of law, any more than of equity, to be found in the Year Books or old

abridgments. . . . By 'equitable jurisdiction' must be understood the extraordinary interference of the chancellor, without common-law process or regard to the common-law rules of proceeding, upon the petition of a party grieved who was without adequate remedy in a court of common law; whereupon the opposite party was compelled to appear and to be examined, either personally or upon written interrogatories; and evidence being heard on both sides, without the interposition of a jury, an order was made *secundum æquum et bonum*, which was enforced by imprisonment. Such a jurisdiction had belonged to the *Aula Regia*, and was long exercised by parliament; and when parliament was not sitting, by the king's ordinary council. Upon the dissolution of the *Aula Regia* many petitions, which parliament or the council could not conveniently dispose of, were referred to the chancellor, sometimes with, and sometimes without assessors. To avoid the circuity of applying to parliament or the council, the petition was very soon, in many instances, addressed originally to the chancellor himself." (Lives of Chancellors, i. 7.)

In the latter part of Edward III.'s long reign, this equitable jurisdiction had become, it is likely, of such frequent exercise, that we may consider the following brief summary by Lord Campbell, as probable by analogy and substantially true, if not sustained in all respects by the evidence that has yet been brought to light: — "The jurisdiction of the Court of Chancery was now established in all matters where its own officers were concerned, in petitions of right where an injury was alleged to be done to a subject by the king or his officers, in relieving against judgments in courts of law (Lord C. gives two instances), and generally in cases of fraud, accident, and trust." (p. 291.)

In the reign of Richard II. the writ of *subpœna* was invented by John de Waltham, Master of the Rolls; and to this a great importance seems to have been attached at the time, as we may perceive by the frequent complaints of the Commons in parliament, and by the traditionary

abhorrence in which the name of the inventor was held. "In reality," says Lord Campbell, "he first framed it in its present form when a clerk in Chancery, in the latter end of the reign of Edward III.; but the invention consisted in merely adding to the old clause *Quibusdam certis de causis*, the words, "*Et hoc sub pœna centum librarum nullatenus omittas;*" and I am a loss to conceive how such importance was attached to it, or how it was supposed to have brought about so complete a revolution in equitable proceedings; for the penalty was never enforced; and if the party failed to appear, his default was treated, according to the practice prevailing in our own time, as a contempt of court, and made the foundation of compulsory process." (p. 296.)

The Commons in parliament, whose sensitiveness to public grievances was by no means accompanied by an equal sagacity in devising remedies, had, probably without intention, vastly enhanced the power of the chancellor, by a clause in a remedial act passed in the thirty-sixth year of Edward III., that—"If any man that feeleth himself aggrieved, contrary to any of the articles above written, or others contained in divers statutes, will come into the Chancery, or any for him, and thereof make his complaint, he shall presently there have remedy by force of the said articles and statutes, without elsewhere pursuing to have remedy." Yet nothing could be more obvious than that the breach of any statute was cognisable before the courts of law. And the mischief of permitting men to be sued vexatiously before the chancellor becoming felt, a statute was enacted, thirty years indeed after this time (17 Ric. II. c. 6.), analogous altogether to those in the late reign respecting the jurisdiction of the council, which reciting that "people be compelled to come before the king's council, or in the Chancery, by writs grounded on untrue suggestions," provides that "the chancellor for the time being presently, after that such suggestions be duly found and proved untrue, shall have power to ordain and award damages, according to his discretion, to him which is so troubled unduly as aforesaid." "This remedy,"

Lord Campbell justly remarks, "which was referred to the discretion of the chancellor himself, whose jurisdiction was to be controlled, proved, as might be expected, wholly ineffectual; but it was used as a parliamentary recognition of his jurisdiction, and a pretence for refusing to establish any other check on it. (p. 247.)

A few years before this statute, the commons had petitioned (13 Ric. II.; Rot. Parl. iii. 269.) that the chancellor might make no order against the common law, and that no one should appear before the chancellor, where remedy was given by the common law. "This carries with it an admission," as Lord C. observes, "that a power of jurisdiction did reside in the chancellor, so long as he did not determine against the common law, nor interfere where the common law furnished a remedy. The king's answer, 'that it should continue as the usage had been heretofore,' clearly demonstrates that such an authority, restrained within due bounds, was recognised by the constitution of the country." (p. 305.)

The act of 17 Ric. II. seems to have produced a greater regularity in the proceedings of the court, and put an end to such hasty interference, on perhaps verbal suggestions, as had given rise to this remedial provision. From the very year in which the statute was enacted, we find bills in Chancery, and the answers to them, regularly filed; the grounds of demanding relief appear; and the chancellor renders himself, in every instance, responsible for the orders he has issued, by thus showing that they came within his jurisdiction. There are certainly many among the earlier bills in Chancery, which, according to the statute law, and the great principle that they were determinable in other courts, could not have been heard; but we are unable to pronounce how far the allegation usually contained or implied, that justice could not be had elsewhere, was founded on the real circumstances. A calendar of these early proceedings (in abstract) is printed in the Introduction to the first volume of the Calendar of Chancery Proceedings in the Reign of Elizabeth, and may also be found in Cooper's Public Records, i. 356.

The struggle, however, in behalf of the common law was not at an end. It is more than probable that the petitions against encroachments of Chancery, which fill the rolls under Henry IV., Henry V., and in the minority of Henry VI., emanated from that numerous and jealous body whose interests, as well as prejudices, were so deeply affected. Certain it is that the Commons, though now acknowledging an equitable jurisdiction, or rather one more extensive than is understood by the word "equitable," in the greatest judicial officer of the crown, did not cease to remonstrate against his transgression of these boundaries. They succeeded so far, in 1436, as to obtain a statute (15 Hen. VI. c. 4.) in these words:—"For that divers persons have before this time been greatly vexed and grieved by writs of *subpœna*, purchased for matters determinable by the common law of this land, to the great damage of such persons so vexed, in suspension and impediment of the common law as aforesaid; Our Lord the King doth command that the statutes thereof made shall be duly observed, according to the form and effect of the same, and that no writ of *subpœna* be granted from henceforth until surety be found to satisfy the party so grieved and vexed for his damages and expenses, if so be that the matter cannot be made good, which is contained in the bill." It was the intention of the Commons, as appears by the preamble of this statute, and more fully by their petition in Rot. Parl. (iv. 101.), that the matters contained in the bill on which the *subpœna* was issued, should be not only true in themselves, but such as could not be determined at common law. But the king's answer appears rather equivocal.

The principle seems, nevertheless, to have been generally established, about the reign of Henry VI., that the Court of Chancery exercises merely a remedial jurisdiction, not indeed controllable by courts of law, unless possibly in such circumstances as cannot be expected, but bound by its general responsibility to preserve the limits which ancient usage and innumerable precedents have imposed. It was at the end of this reign, and not in that of Richard II., as I have inaccurately said in the text, that

the great enhancement of the chancellor's authority, by bringing feoffments to uses within it, opened a new era in the history of our law. And this the judges brought on themselves by their narrow adherence to technical notions. They now began to discover this; and those of Edward IV., as Lord Campbell well says, were "very bold men," having repealed the statute *de donis* by their own authority in Taltarum's case; a stretch of judicial power beyond any that the Court of Chancery had ventured upon. They were also exceedingly jealous of that court; and in one case, reported in the Year Books (22 Edw. IV. 37.), advised a party to disobey an injunction from the Court of Chancery, telling him that if the chancellor committed him to the Fleet, they would discharge the prisoner by *habeas corpus*. (Lord Campbell, p. 394.) The case seems to have been one where, in modern times, no injunction would have been granted, the courts of law being competent to apply a remedy.

193.

PROSPERITY UNDER THE HOUSE OF LANCASTER.

Edit. 1826, vol. iii. p. 316. Edit. 1841, vol. ii. p. 276.

THIS position is hardly borne out by the fact. Numerous proofs might be brought, both from the rolls of parliament and other sources, that there were as many grounds for complaint on account of turbulence and acts of private injury under the Lancastrian princes as before, and the council were quite as active. The statute 31 Hen. VI. c. 2., which I have omitted to mention (it is not printed in Ruffhead's edition), is very important, as giving a legal authority to the council, by writs under the great seal, and by writs of proclamation to the sheriffs, on parties making default, to compel the attendance of any persons complained of for "great riots, extortions, oppressions, and grievous offences," under heavy penalties; in case of a peer, "the loss of his estate, and name of lord, and his

place in parliament," and all his lands for the term of his life; and fine at discretion in the case of other persons. A proviso is added, that no matter determinable by the law of the realm, should be determined in other form than after the course of law in the king's courts. Sir Francis Palgrave (Essay on the King's Council, p. 84.) observes, that this proviso "would in no way interfere with the effective jurisdiction of the council, inasmuch as it could always be alleged in the bills which were preferred before it, that the oppressive and grievous offences of which they complained were not determinable by the ordinary course of the common law." (p. 86.) But this takes the word "determinable" to mean, *in fact;* whereas I apprehend that the proviso must be understond to mean cases legally determinable; the words, I think, will bear no other construction. But as all the offences enumerated were indictable, we must either hold the proviso to be utterly inconsistent with the rest of the statute, or suppose that the words "other form" were intended to prohibit the irregular process usual with the council; secret examination of witnesses, torture, neglect of technical formality in specifying charges, punishments not according to the course of law, and other violations of fair and free trial, which constituted the greatest grievance in the proceedings of the council.

194.

ARTICLES AGREED ON IN THE EIGHTH YEAR OF HENRY VI.

Edit. 1826, vol. iii. p. 216, note *. Edit. 1841, vol. ii. p. 276. note *.

Mr. Bruce has well observed of the articles agreed upon in 8 Hen. VI., or rather of "those in 5 Hen. VI., which were nearly the same, that in theory nothing could be more excellent. In turbulent times, it is scarcely necessary to remark, great men were too apt to weigh out

justice for themselves, and with no great nicety; a court, therefore, to which the people might fly for relief against powerful oppressors, was most especially needful. Law charges also were considerable; and this, 'the poor man's court, in which he might have right without paying any money' (Sir T. Smith's Commonwealth, book iii. ch. 7.), was an institution apparently calculated to be of unquestionable utility. It was the comprehensiveness of the last clause — the 'other cause resonable' — which was its ruin." (Archæologia, vol. xxv. p. 348.)

195.

KING'S ORDINARY COUNCIL.

Edit. 1826, vol. iii. p. 217. Edit. 1841, vol. ii. p. 276.

THIS intricate subject has been illustrated, since the first publication of these volumes, in an Essay upon the original Authority of the King's Council, by Sir Francis Palgrave (1834), written with remarkable perspicuity and freedom from diffusiveness. But I do not yet assent to the judgment of the author as to the legality of proceedings before the council, which I have represented as unconstitutional, and which certainly it was the object of parliament to restrain.

"It seems," he says, "that in the reign of Henry III. the council was considered as a court of peers, within the terms of Magna Charta; and before which, as a court of original jurisdiction, the rights of tenants holding *in capite* or by barony were to be discussed and decided; and it unquestionably exercised a direct jurisdiction over all the king's subjects." (p. 34.) The first volume of Close Rolls, published by Mr. Hardy since Sir F. Palgrave's Essay, contains no instances of jurisdiction exercised by the council in the reign of John. But they begin immediately afterwards, in the minority of Henry III.; so that we have not only the fullest evidence that the council took on itself a coercive jurisdiction in matters of law at that

time, but that it had not done so before. For the Close Rolls of John are so full as to render the negative argument satisfactory. It will, of course, be understood that I take the facts on the authority of Mr. Hardy (Introduction to Close Rolls, vol. ii.), whose diligence and accuracy are indisputable. Thus this exercise of judicial power began immediately after the Great Charter. And yet, if it is to be reconciled with the twenty-ninth section, it is difficult to perceive in what manner that celebrated provision for personal liberty against the crown, which has always been accounted the most precious jewel in the whole coronet, the most valuable stipulation made at Runnymede, and the most enduring to later times, could merit the fondness with which it has been regarded. "Non super eum ibimus, nec super eum mittemus, nisi per legale judicium parium suorum, vel per legem terræ." If it is alleged that the jurisdiction of the king's council was the law of the land, the whole security falls to the ground, and leaves the grievance as it stood, unredressed. Could the judgment of the council have been reckoned, as Sir F. Palgrave supposes, a "judicium parium suorum," except, perhaps, in the case of tenants-in-chief? The word is commonly understood of that trial *per pais* which, in one form or another, is of immemorial antiquity in our social institutions.

"Though this jurisdiction," he proceeds, "was more frequently called into action when parliament was sitting, still it was no less inherent in the council at all other times; and until the middle of the reign of Edward III., no exception had ever been taken to the form of its proceedings." He subjoins, indeed, in a note, "Unless the statute of 5 Edw. III. c. 9. may be considered as an earlier testimony against the authority of the council. This, however, is by no means clear, and there is no corresponding petition in the parliament roll from which any further information could be obtained." (p. 34.)

The irresistible conclusion from this passage is, that we have been wholly mistaken in supposing the Commons under Edward III. and his successors, to have resisted an

illegal encroachment of power in the king's ordinary council, while it had in truth been exercising an ancient jurisdiction, never restrained by law and never complained of by the subject. This would reverse our constitutional theory to no small degree, and affect so much the spirit of my own pages, that I cannot suffer it to pass, coming on an authority so respectable, without some comment. But why is it asserted that this jurisdiction was inherent in the council? Why are we to interpret Magna Charta otherwise than according to the natural meaning of the words and the concurrent voice of parliament? The silence of the Commons in parliament under Edward II. as to this grievance, will hardly prove that it was not felt, when we consider how few petitions of a public nature, during that reign, are on the rolls. But it may be admitted that they were not so strenuous in demanding redress, because they were of comparatively recent origin as an estate of parliament, as they became in the next long reign, the most important, perhaps, in our early constitutional history.

It is doubted by Sir F. Palgrave, whether the statute of 5 Edw. III. c. 9. can be considered as a testimony against the authority of the council. It is, however, very natural so to interpret it, when we look at the subsequent statutes and petitions of the Commons, directed for more than a century to the same object. "No man shall be taken," says Lord Coke, (2 Inst. 46.) "that is, restrained of liberty, by petition or suggestion to the king or to his council, unless it be by indictment or presentment of good and lawful men, where such deeds be done. This branch and divers other parts of this act have been wholly explained by divers acts of parliament, &c., quoted in the margent." He then gives the titles of six statutes, the first being this of 5 Edw. III. c. 9. But let us suppose that the petition of the Commons in 25 Edw. III. demanded an innovation in law, as it certainly did in long-established usage. And let us admit what is justly pointed out by Sir F. Palgrave, that the king's first answer to their petition is not commensurate to its re-

quest, and reserves, though it is not quite easy to see what, some part of its extraordinary jurisdiction.* Still the statute itself, enacted on a similar petition in a subsequent parliament, is explicit that "none shall be taken by petition or suggestion to the king or his council, unless it be by indictment or presentment" (in a criminal charge), "or by writ original at the common law" (in a civil suit), "nor shall be put out of his franchise of freehold, unless he have been duly put to answer, and forejudged of the same by due course of law."†

Lord Hale has quoted a remarkable passage from a Year Book, not long after these statutes of 25 Edw. III., and 28 Edw. III., which, if Sir F. Palgrave had not overlooked, he would have found not very favourable to his high notions of the king's prerogative in council. "In after ages," says Hale, "the constant opinion and practice was to disallow any reversals of judgment by the council, which appears by the notable case in Year Book, 39 Edw. III. 14." (Jurisdiction of Lords' House, p. 41.) It is indeed a notable case, wherein the chancellor before the council reverses a judgment of a court of law. "Mes les justices ne pristoient nul regard al reverser devant le council, par

* The words of the petition and answer are the following: —

"Item, que nul franc homme ne soit mys a respondre de son franc tenement, ne de riens qui touche vie et membre, fyns ou redemptions, par apposailles devant le conseil notre Seigneur le Roi, ne devant ses ministres queconques, sinoun par proces de ley de ces en arere use."

"Il plest a notre Seigneur le Roi, que les leies de son roialme soient tenuz et gardez en lour force, et que nul homme soit tenu a respondre de son fraunk tenement, sinoun par processe de ley: mes de chose que touche vie ou membre, contemptz ou excesse, soit fait come ad este use ces en arere." — Rot. Par. ii. 228.

It is not easy to perceive what was reserved by the words, "chose qui touche vie ou membre;" for the council never determined these. Possibly it regarded accusations of treason or felony, which they might entertain as an inquest, though they would ultimately be tried by a jury. Contempts are easily understood; and by excesses were meant riots and seditions. These political offences, which could not be always safely tried in a lower court, it was the constant intention of the government to reserve for the council.

† I have been guilty of an oversight in my note, p. 209. (271.), confounding the petition in the first parliament of 25 Edw. III. with that to the like effect in the second parliament held in the same year. (Rot. Parl. ii. 228. 239.) The statute is founded on the second, and follows its words; nothing had been done in consequence of the first, to which the king had given an answer which perhaps the Commons thought unsatisfactory.

ceo que ce ne fust place ou jugement purroit estre reverse." If the council could not exercise this jurisdiction on appeal, which is not perhaps expressly taken away by any statute, much less, against the language of so many statutes, could they lawfully entertain any original suit. Such, however, were the vacillations of a motley assembly, so steady the perseverance of government in retaining its power, so indefinite the limits of ancient usage, so loose the phrases of remedial statutes, passing sometimes by their generality the intentions of those who enacted them, so useful, we may add, and almost indispensable, was a portion of those prerogatives which the crown exercised through the council and chancery, that we find soon afterwards a statute (37 Edw. III. c. 18.) which recognises in some measure those irregular proceedings before the council, by providing only that those who make suggestions to the chancellor and great council, by which men are put in danger against the form of the charter, shall give security for proving them. This is rendered more remedial by another act next year (38 Edw. III. c. 9.), which, however, leaves the liberty of making such suggestions untouched. The truth is, that the act 25 Edw. III. went to annihilate the legal and equitable jurisdiction of the Court of Chancery; the former of which had been long exercised, and the latter was beginning to spring up. But the 42 Edw. III. c. 3., which seems to go as far as the former in the enacting words, will be found, according to the preamble, to regard only criminal charges.

I have inclined too strongly to the supposition that the grievances of encroachment on the law by the king's council became less frequent after the accession of the Lancastrian princes, though I have given several instances in a note, where it was the subject of complaint in parliament. Sir Francis Palgrave, on the other hand, maintains that the council never intermitted its authority, but on the contrary "it continually assumed more consistency and order. It is probable that the long absences of Henry V. from England invested this body with a greater degree of importance. After every minority, and after every appointment

of a select or extraordinary council by authority of the legislature, we find that the ordinary council acquired a fresh impulse and further powers. Hence the next reign constitutes a new era." (p. 80.) He proceeds to give the same passage which I have quoted from Rot. Parl. 8 Hen. VI. vol. v. p. 343, as well as one in an earlier parliament (2 Hen. VI. p. 28.). But I had neglected to state the whole case, where I mention the articles settled in parliament for the regulation of the council. In the first place, this was not the king's ordinary council, but one specially appointed by the Lords in parliament, for the government of the realm during his minority. They consisted of certain lords spiritual and temporal, the chancellor, the treasurer, and a few commoners. These commissioners delivered a schedule of provisions "for the good and the governance of the land, which the lords that be of the king's council desireth." (p. 28.). It does not explicitly appear that the Commons assented to these provisions; but it may be presumed, at least in a legal sense, by their being present, and by the schedule being delivered into parliament, "baillez en meme le parlement." But in the 8 Hen. VI., where the same provision as to the jurisdiction of this extraordinary council is repeated, the articles are said, after being approved by the lords spiritual and temporal, to have been read "coram domino rege in eodem parliamento, in presentia trium regni statuum." (p. 343.) It is always held that what is expressly declared to be done in the presence of all the estates, is an act of parliament.

We find, therefore, a recognition of the principle which had always been alleged in defence of the ordinary council in this parliamentary confirmation; the principle that breaches of the law, which the law could not, through the weakness of its ministers, or corruption, or partiality, sufficiently repress, must be reserved for the strong arm of royal authority. "Thus," says Sir Francis Palgrave, "did the council settle and define its principles and practice. A new tribunal was erected, and one which obtained a virtual supremacy over the common law. The exception

reserved to their 'discretion' of interfering wherever their lordships felt too much might on one side, and too much unmight on the other, was of itself sufficient to embrace almost every dispute or trial." (p. 81.)

But, in the first place, this latitude of construction was not by any means what the parliament meant to allow, nor could it be taken, except by wilfully usurping powers never imparted; and, secondly, it was not the ordinary council which was thus constituted during the king's minority; nor did the jurisdiction intrusted to persons so specially named in parliament extend to the regular officers of the crown. The restraining statutes were suspended for a time in favour of a new tribunal. But I have already observed, that there was always a class of cases, precisely of the same kind as those mentioned in the act creating this tribunal, tacitly excluded from the operation of those statutes, wherein the coercive jurisdiction of the king's ordinary council had great convenience; namely, where the course of justice was obstructed by riots, combinations of maintenance, or overawing influence. And there is no doubt that, down to the final abolition of the Court of Star Chamber (which was no other than the *consilium ordinarium* under a different name), these offences were cognisable in it, without the regular forms of the common law.*

"From the reign of Edward IV. we do not trace any further opposition to the authority either of the Chancery or of the council. These courts had become engrafted on the constitution; and if they excited fear or jealousy, there was no one who dared to complain. Yet additional parliamentary sanction was not considered as unnecessary by Henry VII., and in the third year of his reign an act was passed for giving the Court of Star Chamber, which had now acquired its determinate name, further authority to punish divers misdemeanours." (Palgrave, p. 97.)

It is really more than we can grant, that the jurisdiction of the *consilium ordinarium* had been engrafted

* See the last Note for the statute 31 H. VI. c. 2.

on the constitution, when the statute-book was full of laws to restrain, if not to abrogate it. The acts already mentioned, in the reign of Henry VI., by granting a temporary and limited jurisdiction to the council, demonstrate that its general exercise was not acknowledged by parliament. We can only say, that it may have continued without remonstrance in the reign of Edward IV. I have observed in the text, that the Rolls of Parliament under Edward IV. contain no complaints of grievances. But it is not quite manifest that the council did exercise in that reign as much jurisdiction as it had once done. Lord Hale tells us, that "this jurisdiction was gradually brought into great disuse, though there remain some straggling footsteps of their proceedings till near 3 Hen. VII." (Hist. of Lords' Jurisdiction, p. 38.) And the famous statute in that year, which erected a new court, sometimes improperly called the Court of Star-Chamber, seems to have been prompted by a desire to restore, in a new and more legal form, a jurisdiction which was become almost obsolete, and, being in contradiction to acts of parliament, could not well be rendered effective without one.*

We cannot but discover throughout the learned and luminous Essay on the Authority of the King's Council, a strong tendency to represent its exercise as both constitutional and salutary. The former epithet cannot, I think, be possibly applicable in the face of statute law; for what else determines our constitution? But it is a problem with some, whether the powers actually exerted by this anomalous court, admitting them to have been, at least latterly, in contravention of many statutes, may not have been rendered necessary by the disorderly condition of society and the comparative impotence of the common law. This cannot easily be solved with the defective knowledge that we possess. Sometimes, no doubt, the "might on one side, and unmight on the other," as the answer to a petition forcibly expresses it, afforded a justification which, practically at least, the Commons them-

* See Constitutional History of England, vol. i. p. 49. (1842.)

selves were content to allow. But were these exceptional instances so frequent as not to leave a much greater number, wherein the legal remedy by suit before the king's justices of assise might have been perfectly effectual? For we are not concerned with the old county-courts, which were perhaps tumultuary and partial enough, but with the regular administration, civil and criminal, before the king's justices of oyer and terminer and of gaol delivery. Had not they, generally speaking, in the reign of Edward III. and his successors, such means of enforcing the execution of law as left no sufficient pretext for recurring to an arbitrary tribunal? Liberty, we should remember, may require the sacrifice of some degree of security against private wrong, which a despotic government, with an unlimited power of restraint, can alone supply. If no one were permitted to travel on the high road without a licence, or, as now so usual, without a passport, if no one could keep arms without a registry, if every one might be indefinitely detained on suspicion, the evil doers of society would be materially impeded, but at the expense, to a certain degree, of every man's freedom and enjoyment. Freedom being but a means to the greatest good, times might arise when it must yield to the security of still higher blessings; but the immediate question is, whether such were the state of society in the fourteenth and fifteenth centuries. Now that it was lawless and insecure, comparatively with our own times or the times of our fathers, is hardly to be disputed. But if it required that arbitrary government which the king's council were anxious to maintain, the representatives of the commons in parliament, knights and burgesses, not above the law, and much interested in the conservation of property, must have complained very unreasonably for more than a hundred years. They were apparently as well able to judge as our writers can be; and if they reckoned a trial by jury at *nisi prius* more likely, on the whole, to insure a just adjudication of a civil suit, than one before the great officers of state and other constituent members of the

ordinary council, it does not seem clear to me that we have a right to assert the contrary. This mode of trial by jury, as has been seen in another place, had acquired, by the beginning of the fifteenth century, its present form; and considering the great authority of the judges of assise, it may not probably have given very frequent occasion for complaint of partiality or corrupt influence.

196.

PREROGATIVE OF ENGLISH KINGS.

Edit. 1826, vol. iii. p. 226. Edit. 1841, vol. ii. p. 282.

THE learned author of the Inquiry into the Rise and Growth of the Royal Prerogative in England, has founded his historical theory on the confusion which he supposes to have grown up between the ideal king of the constitution and the personal king on the throne. By the former he means the personification of abstract principles, sovereign power, and absolute justice, which the law attributes to the *genus* king, but which flattery or other motives have transferred to the possessor of the crown for the time being, and have thus changed the Teutonic *cyning*, the first man of the commonwealth, the man of the highest weregild, the man who was so much responsible that he might be sued for damages in his own courts or deposed for misgovernment, into the sole irresponsible person of indefeasible prerogatives, of attributes almost divine, whom Broctan and a long series of subsequent lawyers raised up to a height far beyond the theory of our early constitution.

This is supported with great acuteness and learning; nor is it possible to deny that the king of England, as the law books represent him, is considerably different from what we generally conceive an ancient German chieftain to have been. Yet I doubt whether Mr. Allen has not laid too much stress on this, and given to the fictions of law a greater influence than they possessed in those times to

which his inquiry relates; and whether, also, what he calls the monarchical theory was so much derived from foreign sources as he apprehends. We have no occasion to seek, in the systems of civilians or the dogmas of churchmen, what arose from a deep-seated principle of human nature. A king is a person; to persons alone we attach the attributes of power and wisdom; on persons we bestow our affection or our ill-will. An abstraction, a politic idea of royalty, is convenient for lawyers; it suits the speculative reasoner, but it never can become so familiar to a people, especially one too rude to have listened to such reasoners, as the simple image of the king, the one man whom we are to love and to fear. The other idea is a sort of monarchical pantheism, of which the vanishing point is a republic. And to this the prevalent theory, that kings are to reign but not to govern, cannot but lead. It is a plausible, and in the main, perhaps, for the times we have reached, a necessary theory; but it renders monarchy ultimately scarcely possible. And it was neither the sentiment of the Anglo-Saxons, nor of the Norman baronage; the feudal relation was essentially and exclusively personal; and if we had not enough, in a more universal feeling of human nature, to account for loyalty, we could not mistake its inevitable connexion with the fealty and homage of the vassal. The influence of Roman notions was not inconsiderable upon the Continent; but they never prevailed very much here; and though, after the close alliance between the Church and state established by the Reformation, the whole weight of the former was thrown into the scale of the crown, the mediæval clergy, as I have observed in the text, were any thing rather than upholders of despotic power.

It may be very true that, by considering the monarchy as a merely political institution, the scheme of prudent men to avoid confusion, and confer the *minimum* of personal authority on the reigning prince, the principle of his irresponsibility seems to be better maintained. But the question to which we are turning our eyes is not a political one; it relates to the positive law and positive senti-

ments of the English nation in the mediæval period. And here I cannot put a few necessary fictions grown up in the courts, such as, the king never dies, the king can do no wrong, the king is everywhere, against the tenor of our constitutional language, which implies an actual and active personality. Mr. Allen justly observes, that the act against the Despensers under Edward II., and re-confirmed after its repeal, for promulgating the doctrine that allegiance had more regard to the crown than to the person of the king, "seems to establish as the deliberate opinion of the legislature, that allegiance is due to the person of the king generally, and not merely to his crown or politic capacity, so as to be released and destroyed by his misgovernment of the kingdom" (p. 14); which he adds, is not easily reconcilable with the deposition of Richard II. But that was accomplished by force, with whatever formalities it may have been thought expedient to surround it.

We cannot, however, infer from the declaration of the legislature, that allegiance is due to the king's person and not to his politic capacity, any such consequence as that it is not, in any possible case, to be released by his misgovernment. This was surely not in the spirit of any parliament under Edward II. or Edward III.; and it is precisely because allegiance is due to the person, that upon either feudal or natural principles, it might be cancelled by personal misconduct. A contrary language was undoubtedly held under the Stuarts; but it was not that of the mediæval period.

The tenet of our law, that all the soil belongs theoretically to the king, is undoubtedly an enormous fiction, and very repugnant to the barbaric theory preserved by the Saxons, that all unappropriated land belonged to the folk, and was unalienable without its consent.* It was, however, but an extension of the feudal tenure to the whole kingdom, and rested on the personality of feudal homage.

* It has been mentioned in a former note, on Mr. Allen's authority, that the folcland had acquired the appellation *terra regis* before the Conquest.

William established it more by his power, than by any theory of lawyers; though doubtless his successors often found lawyers as ready to shape the acts of power into a theory as if they had originally projected them. And thus grew up the high schemes of prerogative which, for many centuries, were in conflict with those of liberty. We are not able, nevertheless, to define the constitutional authority of the Saxon kings; it was not legislative, nor was that of William and his successors ever such; it was not exclusive of redress for private wrong, nor was this ever the theory of English law, though the method of remedy might not be sufficiently effective; yet it had certainly grown before the Conquest, with no help from Roman notions, to something very unlike that of the German kings in Tacitus.

197.

POPULAR POETRY.

Edit. 1826, vol. iii. p. 244. Edit. 1841, vol. ii. p. 297.

THE public history of Europe in the middle ages inadequately represents the popular sentiment, or only when it is expressed too loudly to escape the regard of writers intent sometimes on less important subjects. But when we descend below the surface, a sullen murmur of discontent meets the ear, and we perceive that mankind was not more insensible to wrongs and sufferings than at present. Besides the various outbreakings of the people in several counties, and their complaints in parliament, after the commons obtained a representation, we gain a conclusive insight into the spirit of the times by their popular poetry. Two very interesting collections of this kind have been lately published by the Camden Society, through the diligence of Mr. Thomas Wright; one, the Poems attributed to Walter Mapes; the other, the Political Songs of England, from John to Edward II.

Mapes lived under Henry II., and has long been known as the reputed author of humorous Latin verses;

but it seems much more probable, that the far greater part of the collection lately printed is not from his hand. They may pass, not for the production of a single person, but rather of a class, during many years, or, in general words, a century, ending with the death of Henry III. in 1272. Many of them are professedly written by an imaginary Golias.

"They are not the expressions of hostility of one man against an order of monks, but of the indignant patriotism of a considerable portion of the English nation against the encroachments of civil and ecclesiastical tyranny." (Introduction to Poems ascribed to Walter Mapes, p. 21.) The poems in this collection reflect almost entirely on the pope and the higher clergy. They are all in rhyming Latin, and chiefly, though with exceptions, in the loose trochaic metre called Leonine. The authors, therefore, must have been clerks, actuated by the spirit which, in a Church of great inequality in its endowments, and with a very numerous body of poor clergy, is apt to gain strength, but certainly, as ecclesiastical history bears witness, not one of mere envious malignity towards the prelates and the court of Rome. These deserved nothing better, in the thirteenth century, than biting satire and indignant reproof, and the poets were willing enough to bestow both.

But this popular poetry of the middle ages did not confine itself to the Church. In the collection entitled, "Political Songs," we have some reflecting on Henry III., some on the general administration. The famous song on the battle of Lewes in 1264 is the earliest in English; but in the reign of Edward I. several occur in that language. Others are in French or in Latin; one complaining of the taxes is in an odd mixture of these two languages; which, indeed, is not without other examples in mediæval poetry. These Latin songs could not, of course, have been generally understood. But what the priests sung in Latin, they said in English; the lower clergy fanned the flame, and gave utterance to what others felt. It may, perhaps, be remarked as a proof of general sympathy with the democratic spirit which was then

fermenting, that we have a song of exultation on the great defeat which Philip IV. had just sustained at Courtrai, in 1302, by the burgesses of the Flemish cities, on whose liberties he had attempted to trample (p. 187.). It is true that Edward I. was on ill terms with France, but the political interests of the king would not, perhaps, have dictated the popular ballad.

It was an idle exaggeration in him who said that, if he could make the ballads of a people, any one might make their laws. Ballads, like the press, and especially that portion of the press which bears most analogy to them, generally speaking, give vent to a spirit which has been at work before. But they had, no doubt, an influence in rendering more determinate, as well as more active, that resentment of wrong, that indignation at triumphant oppression, that belief in the vices of the great, which, too often for social peace and their own happiness, are cherished by the poor. In comparison, indeed, with the efficacy of the modern press, the power of ballads is trifling. Their lively sprightliness, the humorous tone of their satire, even their metrical form, sheathe the sting, and it is only in times when political bitterness is at its height that any considerable influence can be attached to them, and then it becomes undistinguishable from more energetic motives. Those which we read in the collection above mentioned, appear to me rather the signs of popular discontent than greatly calculated to enhance it. In that sense they are very interesting, and we cannot but desire to see the promised continuation to the end of Richard II.'s reign.* They are said to have become afterwards less frequent, though the wars of the Roses were likely to bring them forward.

Some of the political songs are written in France, though relating to our kings John and Henry III. Deducting these, we have two in Latin for the former reign;

* Mr. Wright has given a few specimens in Essays on the Literature and Popular Superstitions of England in the Middle Ages, vol. i. p. 257. In fact we may reckon Piers Plowman an instance of popular satire, though far superior to the rest.

seven in Latin, three in French (or what the editor calls Anglo-Norman, which is really the same thing), one in a mixture of the two, and one in English, for the reign of Henry III. In the reigns of Edward I. and Edward II. we have eight in Latin, three in French, nine in English, and four in mixed languages; a style employed probably for amusement. It must be observed, that a large proportion of these songs contain panegyric and exultation on victory rather than satire; and that of the satire much is general, and much falls on the Church; so that the animadversions on the king and the nobility are not very frequent, though with considerable boldness; but this is more shown in the Latin than the English poems.

198.

VILLENAGE.

Edit. 1826, vol. iii. p. 254. Edit. 1841, vol. ii. p. 301.

The reduction of the free ceorls into villenage, especially if as general as is usually assumed, is one of the most remarkable innovations during the Anglo-Norman period; and one which, as far as our published records extend, we cannot wholly explain. Observations have been made on it by Mr. Wright, in the Archæologia (vol. xxx. p. 225.). After adverting to the oppression of the peasants in Normandy, which produced several rebellions, he proceeds thus:—"These feelings of hatred and contempt for the peasantry, were brought into our island by the Norman barons in the latter half of the eleventh century. The Saxon laws and customs continued; but the Normans acted as the Franks had done towards the Roman coloni; they enforced with harshness the laws which were in their own favour, and gradually threw aside, or broke through, those which were in favour of the miserable serf."

In the Laws of Henry I. we find the weregild of the twy-hinder, or villein, set at 200 shillings in Wessex, "quæ caput regni est et legum." (c. 70.) But this

expression argues an Anglo-Saxon source; and, in fact, so much in that treatise seems to be copied, without regard to the change of times, from old authorities, mixed up with provisions of a feudal or Norman character, that we hardly know how to distinguish what belongs to each period. It is far from improbable that villenage, in the sense the word afterwards bore, that is, an absolutely servile tenure of lands, not only without legal rights over them, but with an incapacity of acquiring either immovable or movable property against the lord, may have made considerable strides before the reign of Henry II.* But unless light should be thrown on its history by the publication of more records, it seems almost impossible to determine the introduction of prædial villenage more precisely than to say, it does not appear in the laws of England at the Conquest, and it does so in the time of Glanvil. Mr. Wright's memoir, in the Archæologia above quoted, contains some interesting matter; but he has too much confounded the *theow*, or Anglo-Saxon slave, with the *ceorl*; not even mentioning the latter, though it is indisputable that *villanus* is the equivalent of *ceorl*, and *servus* of *theow*.

But I suspect that we go a great deal too far in setting down the descendants of these ceorls, that is, the whole Anglo-Saxon population except thanes and burgesses, as almost universally to be counted such villeins as we read of in our law-books, or in concluding that the cultivators of the land, even in the thirteenth century, were wholly, or at least generally, servile. It is not only evident that small freeholders were always numerous, but we are, perhaps, greatly deceived in fancying that the occupiers of villein tenements were usually villeins. *Terre-tenants en villenage*, and tenants *par copie*, who were undoubtedly free,

* A presumptive proof of this may be drawn from a chapter in the Laws of Henry I. c. 81., where the penalty payable by a villein for certain petty offences is set at thirty pence; that of a *cotset* at fifteen; and of a theow at six. The passage is extremely obscure; and this proportion of the three classes of men is almost the only part that appears evident. The cotset, who is often mentioned in Domesday, may thus have been an inferior villein, nearly similar to what Glanvil and later lawbooks call such.

appear in the early Year Books, and we know not why they may not always have existed.* This, however, is a subject which I am not sufficiently conversant with records to explore; it deserves the attention of those well-informed and diligent antiquaries whom we possess. Meantime it is to be observed, that the lands occupied by *villani* or *bordarii*, according to the Domesday survey, were much more extensive than the copyholds of the present day; and making every allowance for enfranchisements, we can hardly believe that all these lands, being, in fact, by far the greater part of the soil, were the *villenagia* of Glanvil's and Bracton's age. It would be interesting to ascertain at what time the latter were distinguished from *libera tenementa;* at what time, that is, the distinction of territorial servitude, independent as it was of the personal state of the occupant, was established in England.

199.

VILLEINS REGARDANT AND IN GROSS.

Edit. 1826, vol. iii. p. 256. Edit. 1841, vol. ii. p. 302.

THIS identity of condition between the villein regardant and in gross appears to have been, even lately, called in question, and some adhere to the theory which supposes an inferiority in the latter. The following considerations will prove that I have not been mistaken in rejecting it:—

I. It will not be contended that the words "regardant," and "in gross," indicate, of themselves, any specific difference between the two, or can mean any thing but the title by which the villein was held; prescriptive and territorial in one case, absolute in the other. For the proof, therefore, of any such difference, we require some ancient au-

* The following passage in the Chronicle of Brakelonde does not mention any manumission of the ceorl on whom Abbot Samson conferred a manor: — "Unum solum manerium carta suâ confirmavit cuidam Anglico natione, *glebæ adscripto*, de cujus fidelitate plenius confidebat quia bonus agricola erat, et quia nesciebat loqui Gallicè." (p. 24.)

thority, which has not been given. II. The villein regardant might be severed from the manor, with or without land, and would then become a villein in gross. If he was sold as a domestic serf, he might, perhaps, be practically in a lower condition than before, but his legal state was the same. If he was aliened with lands parcel of the manor, as in the case of its descent to co-parceners who made partition, he would no longer be regardant, because that implied a prescriptive dependence on the lord, but would occupy the same tenements, and be in exactly the same position as before. "Villein in gross," says Littleton, "is where a man is seised of a manor whereunto a villein is regardant, and granteth the same villein by deed to another, then he is a villein in gross, and not regardant." (Sect. 181.) III. The servitude of all villeins was so complete that we cannot conceive degrees in it. No one could purchase lands, or possess goods of his own; we do not find that any one, being strictly a villein, held by certain services; "he must have regard," says Coke, "to that which is commanded unto him; or in the words of Bracton, 'a quo præstandum servitium incertum et indeterminatum, ubi scire non poterit vespere quod servitium fieri debet mane.'" (Co. Litt. 120. b.) How could a villein in gross be lower than this? It is true that the villein had one inestimable advantage over the American negro, that he was a freeman, except relatively to his lord; possibly he might be better protected against personal injury; but in his incapacity of acquiring secure property, or of refusing labour, he was just on the same footing. It may be conjectured, that some villeins in gross were descended from the *servi*, of whom we find 25,000 enumerated in Domesday. Littleton says: — "If a man and his ancestors, whose heir he is, have been seised of a villein and of his ancestors, as of villeins in gross, time out of memory of man, these are villeins in gross." (Sect. 182.)

It has been often asserted, that villeins in gross seem not to have been a numerous class, and it might not be easy to adduce distinct instances of them in the fourteenth and

fifteenth centuries, though we should scarcely infer, from the pains Littleton takes to describe them, that none were left in his time. But some may be found in an earlier age. In the ninth of John, William sued Ralph the priest for granting away lands which he held to Canford priory. Ralph pleaded that they were his freehold. William replied that he held them in villenage, and that he (the plaintiff) had sold one of Ralph's sisters for four shillings. (Blomfield's Norfolk, vol. iii. p. 860.—4to edition.) And Mr. Wright has found in Madox's Formulare Anglicanum, not less than five instances of villeins sold with their family and chattels, but without land. (Archæologia, xxx. 228.) Even where they were sold along with land, unless it were a manor, they would, as has been observed before, have been villeins in gross. I have, however, been informed, that in valuations under escheats, in the old records, a separate value is never put upon villeins; their alienation without the land was apparently not contemplated. Few cases concerning villeins in gross, it has been said, occur in the Year Books; but villenage of any kind does not furnish a great many; and in several I do not perceive, in consulting the report, that the party can be shown to have been regardant. One reason why villeins in gross should have become less and less numerous was that they could, for the most part, only be claimed by showing a written grant, or by prescription through descent; so that if the title-deed were lost, or the descent unproved, the villein became free.

Manumissions were often no doubt gratuitous; in some cases the villein seems to have purchased his freedom. For though in strictness, as Glanvil tells us, he could not "libertatem suam suis denariis quærere," inasmuch as all he possessed already belonged to the lord, it would have been thought a meanness to insist on so extreme a right. In order, however, to make the deed more secure, it was usual to insert the name of a third person as paying the consideration-money for the enfranchisement. (Archæologia, xxx. 228.)

It appears not by any means improbable, that regular

money payments, or other fixed liabilities, were often substituted instead of uncertain services, for the benefit of the lord as well as the tenant. And when these had lasted a considerable time in any manor, the villenage of the latter, without any manumission, would have expired by desuetude. But, perhaps, an entry of his tenure on the court-roll, with a copy given to himself, would operate of itself, in construction of law, as a manumission. This I do not pretend to determine.

200.

BATTLE OF ST. ALBANS.

Edit. 1826, vol. iii. p. 285. note ‡. Edit. 1841, vol. ii. p. 321. note ‡.

THIS account of the trifling loss of life in the battle of St. Albans is confirmed by a contemporary letter, published in the Archæologia (xx. 519.). The whole number of the slain was but forty-eight, including, however, several lords.

CHAP. IX.

STATE OF SOCIETY AND LETTERS.

THE subject of the present Chapter, so far as it relates to the condition of literature in the middle ages, has been again treated by me in the first and second chapters of a work, published in 1836, The Introduction to the History of Literature in the Fifteenth, Sixteenth, and Seventeenth Centuries. Some things will be found in it more exactly stated, others newly supplied from recent sources. It will not, therefore, be required of me to do more on this occasion than to correct a few errors, or to furnish a few illustrations of literary history. Other parts of this Chapter, especially what relates to the progress of commerce and society, might have been greatly enlarged; but I have already extended these notes much beyond my intention.

201.

AVITUS.

Edit. 1826, vol. iii. p. 325. Edit. 1841, vol. ii. p. 348.

IT seems rather probable that the poetry of Avitus belongs to the fifth century, though not very far from its termination. He was the correspondent of Sidonius Apollinaris, who died in 489, and we may presume his poetry to have been written rather early in life.

202.

COULD CHARLEMAGNE WRITE?.

Edit. 1826, vol. iii. p. 330. Edit. 1841, vol. ii. p. 351.

MANY are still unwilling to believe that Charlemagne could not write. M. Ampère observes that the emperor asserts himself to have been the author of the Libri Carolini, and is said by some to have composed verses. (Hist. Litt. de la France, iii. 37.) But did not Henry VIII. claim a book against Luther, which was not written by himself? *Qui facit per alium, facit per se,* is in all cases a royal prerogative. Even if the book were Charlemagne's own, might he not have dictated it? I have been informed that there is a manuscript at Vienna with autograph notes of Charlemagne in the margin. But is there sufficient evidence of their genuineness? The great difficulty is to get over the words which I have quoted from Eginhard. M. Ampère ingeniously conjectures that the passage does not relate to simple common writing, but to calligraphy; the art of delineating characters in a beautiful manner, practised by the copyists, and of which a contemporaneous specimen may be seen in the well-known Bible of the British Museum. Yet it must be remembered, that Charlemagne's early life passed in the depths of ignorance; and Eginhard gives a fair reason why he failed in acquiring the art of writing, that he began too late. Fingers of fifty are not made for a new skill. It is not, of course, implied by the words that he could not write his own name; but that he did not acquire such a facility as he desired.

203.

THE DARK AGES.

Edit. 1826, vol. iii. p. 331? Edit. 1841, vol. ii. p. 352.

THE literary ignorance of the Dark Ages is not touched in the text with sufficient discrimination, and the colours are somewhat overcharged. It is not enough to say that there were gradual shades of twilight on each side of the greatest obscurity. A rapid decline of learning began in the sixth century, of which Gregory of Tours is both a witness and an example. It is, therefore, properly one of the dark ages, more so by much than the eleventh, which concludes them; since very few were left in the Church who possessed any acquaintance with classical authors, or who wrote with any command of the Latin language. Their studies, whenever they studied at all, were almost exclusively theological; and this must be understood as to the subsequent centuries. By theological is meant the vulgate Scriptures and some of the Latin fathers; not, however, by reasoning upon them, or doing much more than introducing them as authority in their own words. In the seventh century, and still more at the beginning of the eighth, very little even of this remained in France, where we find hardly a name deserving of remembrance in a literary sense; but Isidore, and our own Bede, do honour to Spain and Britain.

It may certainly be said for France and Germany, notwithstanding a partial interruption in the latter part of the ninth and beginning of the tenth century, that they were gradually progressive from the time of Charlemagne. But then this progress was so very slow, and the men in front of it so little capable of bearing comparison with those of later times, considering their writings positively and without indulgence, that it is by no means unjust to call the centuries dark which elapsed between Charlemagne and the manifest revival of literary pursuits towards the

end of the eleventh century. Alcuin, for example, has left us a good deal of poetry. This is superior to what we find in some other writers of the obscure period, and indicates both a correct ear and a familiarity with the Latin poets, especially Ovid. Still his verses are not as good as those which schoolboys of fourteen now produce, either in poetical power, or in accuracy of language and metre. The errors indeed are innumerable. Aldhelm, an earlier Anglo-Saxon poet, with more imaginative spirit, is farther removed from classical poetry. Lupus, abbot of Ferrières, in some of his epistles writes tolerable Latin, though this is far from being always the case; he is smitten with a love of classical literature, quotes several poets and prose writers, and is almost as curious about little points of philology as an Italian scholar of the fifteenth century. He was continually borrowing books in order to transcribe them; a proof, however, of their scarcity, and of the low condition of general learning, which is the chief point we have to regard.* But his more celebrated correspondent, Eginhard, went beyond him. Both his Annals and the Life of Charlemagne are very well written, in a classical spirit, unlike the church Latin; though a few words and phrases may not be of the best age, I should place Eginhard above Alcuin and Lupus, or, as far as I know, any other of the Caroline period.

The tenth century has in all times borne the worst name. Baronius calls it, in one page, *plumbeum, obscurum, infelix.* (Annales, A.D. 900.) And Cave, who dubs all his centuries by some epithet, assigns *ferreum* to the tenth. Nevertheless, there was considerably less ignorance in France and Germany during the latter part of this age, than before the reign of Charlemagne, or even, perhaps, in it; more glimmerings of acquaintance

* The writings of Lupus Servatus, *Abbot of Ferrières*, were published by *Baluze*; and a good account of them will be found in Ampère's Hist. Litt. (vol. iii. p. 237.), as well as in older works. He is a much better writer than Gregory of Tours, but quite as much inferior to Sidonius Apollinaris. I have observed in Lupus quotations from Horace, Virgil, Martial, Cicero, Aulus Gellius, and Trogus Pompeius (meaning probably Justin).

with the Latin classics appear; and the schools, cathedral and conventual, had acquired a more regular and uninterrupted scheme of instruction. The degraded condition of papal Rome has led many to treat this century rather worse than it deserves; and indeed Italy was sunk very low in ignorance. As to the eleventh century, the upward progress was extremely perceptible. It is commonly reckoned among the dark ages till near its close; but these phrases are of course used comparatively, and because the difference between that and the twelfth was more sensible than we find in any two that are consecutive since the sixth.

The state of literature in England was by no means parallel to what we find on the Continent. Our best age was precisely the worst in France; it was the age of the Heptarchy, that of Theodore, Bede, Aldhelm, Cædmon, and Alcuin, to whom, if Ireland will permit us, we may desire to add Scotus, who came a little afterwards, but whose residence in this island at any time appears an unauthenticated tale. But we know how Alfred speaks of the ignorance of the clergy in his own age. Nor was this much better afterwards. Even the eleventh century, especially before the Conquest, is a very blank period in the literary annals of England. No one can have a conception how wretchedly scanty is the list of literary names from Alfred to the Conquest, who does not look to Mr. Turner's History of the Anglo-Saxons, or to Mr. Wright's Biographia Literaria.

There could be no general truth respecting the past, as it appeared to me, more notorious, or more incapable of being denied with any plausibility, than the characteristic ignorance of Europe during those centuries, which we commonly style the Dark Ages. A powerful stream, however, of what, as to the majority at least, I must call prejudice, has been directed of late years in an opposite direction. The mediæval period, in manners, in arts, in literature, and especially in religion, has been regarded with unwonted partiality; and this favourable temper has

been extended to those ages which had lain most frequently under the ban of historical and literary censure.

A considerable impression has been made on the predisposed by the Letters on the Dark Ages, which we owe to Dr. Maitland. Nor is this by any means surprising; both because the predisposed are soon convinced, and because the Letters are written with great ability, accurate learning, a spirited and lively pen, and, consequently, with a success in skirmishing warfare, which many readily mistake for the gain of a pitched battle. Dr. Maitland is endowed with another quality, far more rare in historical controversy, especially of the ecclesiastical kind.—I believe him to be of scrupulous integrity, minutely exact in all that he asserts; and, indeed, the wrath and asperity which sometimes appear rather more than enough, are only called out by what he conceives to be wilful or slovenly misrepresentation. Had I, therefore, the leisure and means of following Dr. Maitland through his quotations, I should probably abstain from doing so, from the reliance I should place on his testimony, both in regard to his power of discerning truth and his desire to express it. But I have no call for any examination, could I institute it; since the result of my own reflections is, that every thing which Dr. M. asserts as matter of fact, I do not say suggests in all his language, may be perfectly true, without affecting the great proposition, that the dark ages, those from the sixth to the eleventh, were ages of ignorance. Nor does he, as far as I collect, attempt to deny this evident truth; it is merely his object to prove that they were less ignorant, less dark, and in all points of view less worthy of condemnation, than many suppose. I do not gainsay this position; being aware, as I have observed both in this and in another work, that the mere ignorance of these ages, striking as it is in comparison with earlier and later times, has been sometimes exaggerated; and that Europeans, and especially Christians, could not fall back into the absolute barbarism of the Esquimaux. But what a man of profound and accurate learning puts forward with

limitations, sometimes expressed, and always present to his own mind, a heady and shallow retailer takes up, and exaggerates in conformity with his own prejudices.

The Letters on the Dark Ages relate principally to the theological attainments of the clergy during that period, which the author assumes, rather singularly, to extend from A. D. 800 to 1200; thus excluding midnight from his definition of darkness, and replacing it by the break of day. And in many respects, especially as to the knowledge of the vulgate Scriptures possessed by the better-informed clergy, he obtains no very difficult victory over those who have imbibed extravagant notions, both as to the ignorance of the Sacred Writings in those times, and the desire to keep them away from the people. This latter prejudice is obviously derived from a confusion of the subsequent period, the centuries preceding the Reformation, with those which we have immediately before us. But as the word *dark* is commonly used, either in reference to the body of the laity, or to the general extent of liberal studies in the Church, and as it involves a comparison with prior or subsequent ages, it cannot be improper in such a sense, even if the manuscripts of the Bible should have been as common in monasteries as Dr. Maitland supposes; and yet his proofs seem much too doubtful to sustain that hypothesis.

There is a tendency to set aside the verdict of the most approved writers, which gives too much of a polemical character, too much of the tone of an advocate who fights every point, rather than of a calm arbitrator, to the Letters on the Dark Ages. For it is not Henry, or Jortin, or Robertson, who are our usual testimonies, but their immediate masters, Muratori, and Fleury, and Tiraboschi, and Brucker, and the Benedictine authors of the Literary History of France, and many others in France, Italy, and Germany. The latest who has gone over this rather barren ground, and not inferior to any in well-applied learning, in candour or good sense, is M. Ampère, in his Histoire Littéraire de la France avant le douzième siècle (3 vols. Paris, 1840.). No one will accuse this intelligent writer of unduly depre-

ciating the ages which he thus brings before us; and by the perusal of his volumes, to which Heeren and Eichhorn may be added for Germany, we may obtain a clear and correct outline, which, considering the shortness of life compared with the importance of exact knowledge on such a subject, will suffice for the great majority of readers. I by no means, however, would exclude the Letters on the Dark Ages, as a spirited pleading for those who have often been condemned unheard.

I shall conclude by remarking, that one is a little tempted to inquire why so much anxiety is felt by the advocates of the mediæval Church, to rescue her from the charge of ignorance. For this ignorance she was not, generally speaking, to be blamed. It was no crime of the clergy that the Huns burned their churches, or the Normans pillaged their monasteries. It was not by their means that the Saracens shut up the supply of papyrus, and that sheep-skins bore a great price. Europe was altogether decayed in intellectual character, partly in consequence of the barbarian incursions, partly of other sinister influences acting long before. We certainly owe to the Church every spark of learning which then glimmered, and which she preserved through that darkness to rekindle the light of a happier age—Σπέρμα πυρὸς σώζουσα. Meantime, what better apology than this ignorance can be made by protestants, and I presume Dr. Maitland is not among those who abjure the name, for the corruption, the superstition, the tendency to usurpation, which they at least must impute to the Church of the dark ages? Not that, in these respects, it was worse than in a less obscure period; for the reverse is true; but the fabric of popery was raised upon its foundations before the eleventh century, though not displayed in its full proportions till afterwards. And there was so much of lying legend, so much of fraud in the acquisition of property, that ecclesiastical historians have not been loth to acknowledge the general ignorance as a sort of excuse.

204.

SCOTUS OR ERIGENA.

Edit. 1826, vol. iii. p. 335. Edit. 1841, vol. ii. p. 355.

It admits of no doubt that John Scotus was, in a literary and philosophical sense, the most remarkable man of the dark ages; no one else had his boldness, his subtlety in threading the labyrinths of metaphysical speculations which, in the west of Europe, had been utterly disregarded. But it is another question, whether he can be reckoned an original writer; those who have attended most to his treatise De Divisione Naturæ, the most abstruse of his works, consider it as the development of an Oriental philosophy, acquired during his residence in Greece, and nearly coinciding with some of the later Platonism of the Alexandrian school, but with a more unequivocal tendency to pantheism. This manifests itself in some extracts which have latterly been made from the treatise De Divisione Naturæ; but though Scotus had not the reputation of unblemished orthodoxy, the drift of his philosophy was not understood in that barbarous period. He might, indeed, have excited censure by his intrepid preference of reason to authority. "Authority," he says, "springs from reason, not reason from authority —true reason needs not be confirmed by any authority." "La véritable importance historique," says Ampère, "de Scot Erigene n'est donc pas dans ses opinions; celles-ci n'ont d'autre intérêt que leur date et le lieu où elles apparaissent. Sans doute, il est piquant et bizarre de voir ces opinions orientales et alexandrines surgir au IX^e^ siècle, à Paris, à la cour de Charles le Chauve; mais ce qui n'est pas seulement piquant et bizarre, ce qui intéresse le développement de l'esprit humain, c'est que la question ait été posée, dès lors, si nettement entre l'autorité et la raison, et si énergiquement résolue en faveur de la seconde. Et un mot, par ses idées Scot Erigene est

encore un philosophe de l'antiquité Grecque ; et par l'indépendance hautement accusée de son point de vue philosophique, il est déjà un dévancier de la philosophie moderne." (Hist. Litt. iii. 146.)

205.

LIBRARIES IN THE DARK AGES.

Edit. 1826, vol. iii. p. 337. Edit. 1841, vol. ii. p. 356.

CHARLEMAGNE had a library at Aix-la-Chapelle, which he directed to be sold at his death for the benefit of the poor. His son Louis is said to have collected some books. But this rather confirms, on the whole, my supposition that, in some periods, no royal or private libraries existed, since there were not always princes or nobles with the spirit of Charlemagne, or even Louis the Debonair.

"We possess a catalogue," says M. Ampère (quoting d'Achery's Spicilegium, ii. 310.), "of the library in the Abbey of St. Riquier, written in 831 ; it consists of 256 volumes, some containing several works. Christian writers are in great majority ; but we find also the Eclogues of Virgil, the Rhetoric of Cicero, the History of Homer, that is, the works ascribed to Dictys and Dares." (Ampère, iii. 236.) Can any thing be lower than this, if nothing is omitted more valuable than what is mentioned? The Rhetoric of Cicero was probably the spurious books Ad Herennium. But other libraries must have been somewhat better furnished than this ; else the Latin authors would have been still less known in the ninth century than they actually were.

In the gradual progress of learning, a very small number of princes thought it honourable to collect books. Perhaps no earlier instance can be mentioned than that of a most respectable man, William III., Duke of Guienne, in the first part of the eleventh century.

"Fuit dux iste," says a contemporary writer, "a pueritia doctus literis, et satis notitiam Scripturarum habuit; librorum copiam in palatio suo servavit; et si forte a frequentia causarum et tumultu vacaret, lectioni per seipsum operam dabat longioribus noctibus elucubrans in libris, donec somno vinceretur." (Rec. des Hist. x. 155.)

206.

ORDEALS.

Edit. 1826, vol. iii. p. 341. Edit. 1841, vol. ii. p. 359.

"THE spirit of party," says a late writer, "has often accused the Church of having devised these barbarous methods of discovering truth — the duel and the ordeal; nothing can be more unjust. Neither one nor the other is derived from Christianity; they existed long before in the Germanic usages." (Ampère Hist. Litt. de la France, iii. 180.) Any one must have been very ignorant, who attributed the invention of ordeals to the Church. But during the *dark* ages, they were always sanctioned. Agobard, from whom M. Ampère gives a quotation, in the reign of Louis the Debonair, wrote strongly against them; but this was the remonstrance of a superior man in an age that was ill-inclined to hear him.

207.

RELIGION OF THE MIDDLE AGES.

Edit. 1826, vol. iii. p. 350. Edit. 1841, vol. ii p. 365.

THIS hesitation about so important a question, is what I would by no means repeat. Beyond every doubt, the evils of superstition in the middle ages, though separately considered very serious, are not to be weighed against the benefits of the religion with which they were so mingled. The fashion of the eighteenth century, among protestants

especially, was to exaggerate the crimes and follies of mediæval ages—perhaps I have fallen into it a little too much; in the present, we seem more in danger of extenuating them. We still want an inflexible impartiality in all that borders on ecclesiastical history, which, I believe, has never been displayed on an extensive scale. A more captivating book can hardly be named than the Mores Catholici of Mr. Digby; and it contains certainly a great deal of truth; but the general effect is that of a *mirage*, which confuses and deludes the sight. If those "ages of faith" were as noble, as pure, as full of human kindness, as he has delineated them, we have had a bad exchange in the centuries since the Reformation. And those who gaze at Mr. Digby's enchantments, will do well to consider how they can better escape this consequence than he has done. Dr. Maitland's Letters on the Dark Ages, and a great deal more that comes from the pseudo-Anglican or Anglo-Catholic press, converge to the same end; a strong sympathy with the mediæval Church, a great indulgence to its errors, and indeed a reluctance to admit them, with a corresponding estrangement from all that has passed in the last three centuries.

208.

ELIGIUS.

Edit. 1826, vol. iii. p. 354. note. Edit. 1841, vol. ii. p. 367.

THIS passage was imperfectly given by Mosheim, who misled Maclaine his translator, and a number of others. I have acknowledged the error in all editions of this Work after the third, but I here repeat the acknowledgment for those who may not possess the later editions. Much clamour has been made about the mistake of Maclaine, which was innocent, and not unnatural. It has been commented upon, particularly by Dr. Arnold, as a proof of the risk we run of misrepresenting authors, by quoting them at second-

hand. And this is perfectly true, and ought to be constantly remembered. But, so long as we acknowledge the immediate source of our quotation, no censure is due, since in works of considerable extent this use of secondary authorities is absolutely indispensable, not to mention the frequent difficulty of procuring access to original authors.

209.

AMALFI.

Edit. 1826, vol. iii. p. 390. Edit. 1841, vol. ii. p. 391.

There must be, I suspect, some exaggeration about the commerce and opulence of Amalfi, in the only age when she possessed any at all. The city could never have been considerable, as we may judge from its position immediately under a steep mountain; and what is still more material, has a very small port. According to our notions of trade, she could never have enjoyed much; the lines quoted in my note, from William of Apulia, are to be taken as a poet's panegyric. It is of course a question of degree; Amalfi was no doubt a commercial republic to the extent of her capacity; but those who have ever been on the coast must be aware how limited that was. At present she has, I believe, no foreign trade at all.

210.

USURY.

Edit. 1826, vol. iii. p. 406. note *. Edit. 1841, vol. ii. p. 402. note †.

A sentence in my earlier editions was omitted afterwards, on it having been suggested to me that Isaac Walton does not tell us that Bishop Sanderson would not take interest for his money, but would give 100*l.* on condition of receiving 20*l.* annually for seven years. It is mentioned

in a note of Zouch in his edition of Walton's Lives, but not by Walton himself. The distinction, however, was perfectly familiar to the writers on usury; and I do not pretend to say that it was merely frivolous.

211.

DOMESTIC ARCHITECTURE.

Edit. 1826, vol. iii. p. 423. Edit. 1841, vol. ii. p. 413.

THE account of domestic architecture given in the text is very superficial; but the subject still remains, comparatively with other portions of mediæval antiquity, but imperfectly treated. The best sketch that has hitherto been given, is in an article with this title, in the glossary of Ancient Architecture (which should be read in an edition not earlier than that of 1845), from the pen of Mr. Twopeny, whose attention has long been directed to the subject. "There is ample evidence yet remaining of the domestic architecture in this country during the twelfth century. The ordinary manor-houses, and even houses of greater consideration, appear to have been generally built in the form of a parallelogram, two stories high*, the lower story vaulted, with no internal communication between the two, the upper story approached by a flight of steps on the outside; and in that story was sometimes the only fireplace in the whole building. It is more than probable, that this was the usual style of houses in the

* This is rather equivocal. In the review of the "Chronicles of the Mayors and Sheriffs," published in the Archæological Journal (vol. iv. p. 273.), we read — "The houses in London, of whatever material, seem never to have exceeded one story in height." (p. 282.) But, soon afterwards — "The ground floor of the London houses at this period was aptly enough called a cellar, the upper story a solar." It thus appears that the reviewer does not mean the same thing as Mr. Twopeny by the word *story*, which the former confines to the floor above that on the ground, while the latter includes both. The use of language, as we know, supports, in some measure, either meaning; but perhaps it is more correct, and more common, to call the first story that which is reached by a staircase from the ground-floor. The solar, or sleeping-room, raised above the cellar, was often of wood.

preceding century." Instances of houses, partly remaining, are then given. We may add to those mentioned by Mr. Twopeny one, perhaps older than any, and better preserved than some, in his list. At Southampton is a Norman house, perhaps built in the first part of the twelfth century. It is nearly a square, the outer walls tolerably perfect; the principal rooms appear to have been on the first (or upper) floor; it has in this also a fireplace and chimney, and four windows, placed so as to indicate a division into two apartments; but there are no lights below; nor any appearance of an interior staircase. The sides are about forty feet in length. Another house of the same age is near to it, but much worse preserved. *

The parallelogram house, seldom containing more than four rooms, with no access frequently to the upper which the family occupied, except on the outside, was gradually replaced by one on a different type:—the entrance was on the ground, the staircase within; a kitchen and other offices, originally detached, were usually connected with the hall by a passage running through the house; one or more apartments on the lower floor extended beyond the hall; there was seldom or never a third floor over the entire house, but detached turrets for sleeping-rooms rose at some of the angles. This was the typical form which lasted, as we know, to the age of Elizabeth, or even later. The superior houses of this class were sometimes quadrangular, that is, including a court-yard, but seldom per-

* See a full description in the Archæological Journal, vol. iv. p. 11. Those who visit Southampton may seek this house near a gate in the west wall. We may add to the contribution of Mr. Twopeny one published in the Proceedings of the Archæological Institute, by Mr. Hudson Turner, Nov. 1847. This is chiefly founded on documents, as that of Mr. Twopeny is on existing remains. These give more light where they can be found; but the number is very small. Upon the whole, it may be here observed, that we are frequently misled by works of fiction as to the domestic condition of our forefathers. The house of Cedric the Saxon in Ivanhoe, with its distinct and numerous apartments, is very unlike any that remain or can be traced. This is by no means to be censured in the romancer, whose aim is to delight by images more splendid than truth; but, especially when presented by one who possessed in some respects a considerable knowledge of antiquity, and was rather fond of displaying it, there is some danger lest the reader should believe that he has a faithful picture before him.

haps, with more than one side allotted to the main dwelling; offices, stables, or mere walls filled the other three.

Many dwellings erected in the fourteenth century may be found in England; but neither of that or the next age are there more than a very few, which are still, in their chief rooms, inhabited by gentry. But houses, which by their marks of decoration, or by external proof, are ascertained to have been formerly occupied by good families, though now in the occupation of small farmers, and built apparently from the reign of the second to that of the fourth Edward, are common in many counties. They generally bear the name of court, hall, or grange; sometimes only the surname of some ancient occupant, and very frequently have been the residence of the lord of the manor.

The most striking circumstance in the oldest houses is not so much their precautions for defence in the outside staircase, and when that was disused, the better safe-guard against robbery in the moat which frequently environed the walls, the strong gateway, the small window broken by mullions, which are no more than we should expect in the times, but the paucity of apartments, so that both sexes, and that even in high rank, must have occupied the same room. The progress of a regard to decency in domestic architecture has been gradual, and in some respects has been increasing up to our own age. But the mediæval period shows little of it; though in the advance of wealth, a greater division of apartments distinguishes the houses of the fourteenth and fifteenth centuries from those of an earlier period.

The French houses of the twelfth and thirteenth centuries were probably much of the same arrangement as the English; the middle and lower classes had but one hall and one chamber; those superior to them had the solarium or upper floor, as with us. See Archæological Journal (vol. i. p. 212.), where proofs are adduced from the fabliaux of Barbazan.

212.

JACQUES CŒUR.

Edit. 1826, vol. iii. p. 423. Edit. 1841, vol. ii. p. 413.

WHETHER Jacques Cœur had or had not a house at Beaumont-sur-Oise, for which I do not recollect my authority, and it may be a mistake, his much more celebrated mansion was at Bourges, which still exists, and is well known to the curious in architectural antiquity.

213.

CHIMNEYS.

Edit. 1826, vol. iii. p. 425. Edit. 1841, vol. ii. p. 414.

CHIMNEYS are of older date in private houses than the text and note seem to intimate. In a recent work of some reputation, it is said:—"There does not appear to be any evidence of the use of chimney-shafts in England prior to the twelfth century. In Rochester Castle, which is in all probability the work of William Corbyl, about 1130, there are complete fireplaces with semicircular backs, and a shaft in each jamb, supporting a semicircular arch over the opening, and that is enriched with the zig-zag moulding; some of these project slightly from the wall; the flues, however, go only a few feet up in the thickness of the wall, and are then turned out at the back, the apertures being small oblong holes. At the castle, Hedingham, Essex, which is of about the same date, there are fireplaces and chimneys of a similar kind. A few years later, the improvement of carrying the flue up the whole height of the wall appears; as at Christ Church, Hants; the keep at Newcastle; Sherborne Castle, &c. The early chimney shafts are of considerable height, and similar; afterwards they assumed a great variety of forms, and during the

fourteenth century they are frequently very short." (Glossary of Ancient Architecture, p. 100. edit. 1845.) It is said, too, here that chimneys were seldom used in halls till near the end of the fifteenth century; the smoke took its course, if it pleased, through a hole in the roof.

214.

COLOGNE.

Edit. 1826, vol. iii. p. 434. Edit. 1841, vol. ii. p. 420.

THIS is a palpable oversight as to Cologne, which is of the thirteenth century.

The subject of ecclesiastical architecture in the middle ages has been so fully discussed by intelligent and observant writers since these pages were first published, that they require some correction. The Oriental theory for the origin of the pointed architecture, though not given up, has not generally stood its ground; there seems more reason to believe that it was first adopted in Germany, as Mr. Hope has shown; but at first in single arches, not in the construction of the entire building. The circular and pointed forms, instead of one having at once supplanted the other, were concurrent in the same building, through Germany, Italy and Switzerland, for some centuries. I will just add to the instances mentioned by Mr. Hope and others, and which every traveller may corroborate, one not very well known, perhaps as early as any, — the crypt of the cathedral at Basle, built under the reign of the emperor Henry II., near the commencement of the eleventh century, where two pointed with three circular arches stand together, evidently from want of space enough to preserve the same breadth with the necessary height. The same circumstance will be found, I think, in the crypt of St. Denys, near Paris, which, however, is not so old. The writings of Rickman, Whewell and Willis are prominent among many that have thrown light on this subject. The beauty and

magnificence of the pointed style is acknowledged on all sides; perhaps the imitation of it has been too servile, and with too much forgetfulness of some very important changes in our religious aspect, rendering that simply ornamental which was once directed to a great object.

215.

AGRICULTURE OF THE MONKS.

Edit. 1826, vol. iii. p. 436. Edit. 1841, vol. ii. p. 422.

It was the glory of Saint Benedict's reform, to have substituted bodily labour for the supine indolence of Oriental asceticism. In the East it was more difficult to succeed in such an endeavour, though it had been made. "The Benedictins have been," says Guizot, "the great clearers of land in Europe. A colony, a little swarm of monks, settled in places nearly uncultivated, often in the midst of a pagan population, in Germany, for example, or in Britany; there, at once missionaries and labourers, they accomplished their double service through peril and fatigue." (Civilis. en France, Leçon 14.) The north-eastern parts of France, as far as the Lower Seine, were reduced into cultivation by the disciples of St. Columban, in the sixth and seventh centuries. The proofs of this are in Mabillon's Acta Sanctorum Ord. Bened. (See Mém. de l'Acad. des Sciences Morales et Politiques, iii. 708.)

Guizot has appreciated the rule of St. Benedict with that candid and favourable spirit which he always has brought to the history of the Church; anxious as it seems, not only to escape the imputation of protestant prejudices by others, but to combat them in his own mind; and aware, also, that the partial misrepresentations of Voltaire had sunk into the minds of many who were listening to his lectures. Compared with the writers of the eighteenth century, who were too much alienated by the faults of the clergy to acknowledge any redeeming virtues, or

even with Sismondi, who, coming in a moment of reaction, feared the returning influence of mediæval prejudices, Guizot stands forward as an equitable and indulgent arbitrator. In this spirit he says of the rule of St. Benedict— "La pensée morale et la discipline générale en sont sévères; mais dans le détail de la vie elle est humaine et modérée; plus humaine, plus moderée que les lois babares, que les mœurs générales du temps; et je ne doute pas que les frères, renfermés dans l'intérieur d'un monastère, n'y fussent gouvernés par une autorité, à tout prendre, et plus raisonnable, et d'une manière moins dure qu'ils ne l'eussent été dans la societé civile."

216.

VALUE OF MONEY.

Edit. 1826, vol. iii. p. 450. Edit. 1841, vol. ii. p. 429.

M. GUÉRARD, editor of "Paris sous Philippe le Bel," in the Documens Inédits (1841, p. 365), after a comparison of the prices of corn, concludes that the value of silver has declined since that reign, in the ratio of five to one. This is much less than we allow in England. M. Leber (Mém de l'Acad. des Inscript. Nouvelle Série, xiv. 230.) calculates the power of silver under Charlemagne, compared with the present day, to have been as nearly eleven to one. It fell afterwards to eight, and continued to sink during the middle ages; the average of prices during the fourteenth and fifteenth centuries, taking corn as the standard, was six to one; the comparison is of course only for France. This is an interesting paper, and contains tables worthy of being consulted.

217.

WAGES OF LABOUR.

Edit. 1826, vol. iii. p. 456. Edit. 1841, vol. ii. p. 433.

MR. MALTHUS observes on this, that I "have overlooked the distinction between the reigns of Edward III. and Henry VIII. (perhaps a misprint for VI.), with regard to the state of the labouring classes. The two periods appear to have been essentially different in this respect." (Principles of Political Economy, p. 293. 1st edit.) He conceives that the earnings of the labourer in corn were unusually low in the latter years of Edward III., which appears to have been effected by the Statute of Labourers (25. E. III.), immediately after the great pestilence of 1350, though that mortality ought, in the natural course of things, to have considerably raised the real wages of labour. The result of his researches is that, in the reign of Edward III., the labourer could not purchase half a peck of wheat with a day's labour; from that of Richard II. to the middle of that of Henry VI., he could purchase nearly a peck; and from thence to the end of the century, nearly two pecks. At the time when the passage in the text was written (1816), the labourer could rarely have purchased more than a peck with a day's labour, and frequently a good deal less. In some parts of England, this is the case at present (1846); but in many counties the real wages of agricultural labourers are considerably higher than at that time, though not by any means so high as, according to Malthus himself, they were in the latter half of the fifteenth century. The excessive fluctuations in the price of corn, even taking averages of a long term of years, which we find through the middle ages, and indeed much later, account more than any other assignable cause for those in real wages of labour, which do not regulate themselves very promptly by that standard, especially when coercive measures are adopted to restrain them.

218.

WALDENSES AND ALBIGENSES.

Edit. 1826, vol. iii. p. 472. Edit. 1841, vol. ii. p. 444.

THE long battle as to the Manicheism of the Albigensian sectaries has been renewed since the publication of this work, by Dr. Maitland on one side, and Mr. Faber and Dr. Gilly on the other; and it is not likely to reach a termination; being conducted by one party with far less regard to the weight of evidence than to the bearing it may have on the theological hypotheses of the writers. I have seen no reason for altering what is said in the text.

The strength of the argument seems to me to lie in the independent testimonies as to the Manicheism of the Paulicians, in Petrus Siculus and Photius, on the one hand, and as to that of the Languedocian heretics in the Latin writers of the twelfth and thirteenth centuries on the other; the connexion of the two sects through Bulgaria being established by history, but the latter class of writers being unacquainted with the former. It is certain that the probability of general truth in these concurrent testimonies is greatly enhanced by their independence. And it will be found that those who deny any tinge of Manicheism in the Albigenses, are equally confident as to the orthodoxy of the Paulicians.

219.

VERSIONS OF SCRIPTURE.

Edit. 1826, vol. iii. p. 474. Edit. 1841, vol. ii. p. 447.

THE Anglo-Saxon versions are deserving of particular remark. It has been said that our Church maintained the privilege of having part of the daily service in the mother tongue. "Even the mass itself," says Lappenberg, "was

not read entirely in Latin." (Hist. of England, vol. i. p. 202.) This, however, is denied by Lingard, whose authority is probably superior. (Hist. of Ang-Sax. Church, i. 307.) But he allows that the Epistle and Gospel were read in English, which implies an authorised translation. And we may adopt in a great measure Lappenberg's proposition, which follows the above passage: — "The numerous versions and paraphrases of the Old and New Testament made those books known to the laity and more familiar to the clergy."

We have seen a little above, that the laity were not permitted by the Greek Church of the ninth century, and probably before, to read the Scriptures, even in the original. This shows how much more honest and pious the Western Church was, before she became corrupted by ambition and by the captivating hope of keeping the laity in servitude by means of ignorance. The translation of the four Books of Kings into French has been published in the Collection de Documens Inédits, 1841. It is in a northern dialect, but the age seems not satisfactorily ascertained; the close of the eleventh century is the earliest date that can be assigned. Translations into the Provençal by the Waldensian or other heretics were made in the twelfth; several manuscripts of them are in existence, and one is announced for publication by Dr. Gilly.

220.

CHIVALRY.

Edit. 1826, vol. iii. p. 511. Edit. 1841, vol. ii. p. 472.

It appears to me that M. Guizot, to whose judgment I owe all deference, has dwelt rather too much on the feudal character of chivalry. (Hist. de la Civilisation en France, Leçon, 36.) Hence he treats the institution as in its decline during the fourteenth century, when, if we can trust either Froissart or the romancers, it was at its height. Certainly, if mere knighthood was of right both in Eng-

land and the north of France, a territorial dignity, which bore with it no actual presumption of merit, it was sometimes also conferred on a more honourable principle. It was not every knight who possessed a fief, nor in practice did every possessor of a fief receive knighthood.

Guizot justly remarks, as Sismondi has done, the disparity between the lives of most knights and the theory of chivalrous rectitude. But the same has been seen in religion, and can be no reproach to either principle. "Partout la pensée morale des hommes s'éleve et aspire fort au dessus de leur vie. Et gardez vous de croire que parce qu'elle ne gouvernait pas immédiatement les actions, parceque la pratique demontait sans cesse et étrangement la théorie, l'influence de la théorie fût nulle et sans valeur. C'est beaucoup que le jugement des hommes sur les actions humaines; tot ou tard il devient efficace."

It may be thought by many severe judges, that I have over-valued the efficacy of chivalrous sentiments in elevating the moral character of the middle ages. But I do not see ground for withdrawing or modifying any sentence. The comparison is never to be made with an ideal standard, or even with one which a purer religion and a more liberal organisation of society may have rendered effectual, but with the condition of a country where neither the sentiments of honour nor those of right prevail. And it seems to me that I have not veiled the deficiencies and the vices of chivalry any more than its beneficial tendencies.

A very fascinating picture of chivalrous manners has been drawn by a writer of considerable reading, and still more considerable ability, Mr. Kenelm Digby, in his Broad Stone of Honour. The bravery, the courteousness, the munificence, above all, the deeply religious character of knighthood and its reverence for the Church, naturally took hold of a heart so susceptible of these emotions, and a fancy so quick to embody them. St. Palaye himself is a less enthusiastic eulogist of chivalry, because he has seen it more on the side of mere romance, and been less penetrated with the conviction of its moral excellence. But the progress of still deeper impressions

seems to have moderated the ardour of Mr. Digby's admiration for the historical character of knighthood; he has discovered enough of human alloy to render unqualified praise hardly fitting, in his judgment, for a Christian writer; and in the Mores Catholici, the second work of this amiable and gifted man, the colours in which chivalry appears are by no means so brilliant.

221.

CIVIL LAW.

Edit. 1826, vol. iii. p. 520. Edit. 1841, vol. ii. p. 477.

THIS passage is written in a very *English* spirit; the civil lawyers of the mediæval period are not at all forgotten on the Continent, as the great work of Savigny, History of Roman Law in the Middle Ages, sufficiently proves. It is certain that the civil law must always be studied in Europe, nor ought the new codes to supersede it, seeing they are in great measure derived from its fountain; though I have heard that it is less regarded in France than formerly.

222.

EDUCATION BEFORE CHARLEMAGNE.

Edit. 1826, vol. iii. p. 520. Edit. 1841, vol. ii. p. 478.

IT is rather too strongly put, that there were no means of education before Charlemagne, or at least so as possibly to deceive a reader. "Studia liberalium artium" in the passage quoted from Launoy, must be understood to exclude literature, commonly so called, but not a certain measure of very ordinary instruction. For there were episcopal and conventual schools in the seventh and eighth centuries, even in France, especially Aquitaine; we need hardly repeat that in England, the former of these

ages produced Bede and Theodore, and the men trained under them; the Lives of the Saints also lead us to take with some limitation the absolute denial of liberal studies before Charlemagne. (See Guizot, Hist. de la Civilis. en France, Leçon 16.; and Ampère, Hist. Litt. de la France, iii. p. 4.) But, perhaps, philology, logic, philosophy, and even theology were not taught, as sciences, in any of the French schools for these two centuries; and consequently those established by Charlemagne justly make an epoch.

223.

ABELARD.

Edit. 1826, p. 523. Edit. 1841, p. 479.

A GREAT interest has been revived in France for the philosophy, as well as the personal history of Abelard, by the publication of his philosophical writings, in 1836, under so eminent an editor as M. Cousin, and by the excellent work of M. de Rémusat, in 1845, with the title, Abélard, containing a copious account both of the life and writings of that most remarkable man, the father, perhaps, of the theory as to the nature of universal ideas, now so generally known by the name of *conceptualism*.

224.

OXFORD.

Edit. 1826, vol. iii. p. 524. Edit. 1841, vol. ii. p. 480.

THE authenticity of Ingulfus has been called in question, not only by Sir Francis Palgrave, but by Mr. Wright (Biogr. Liter. Anglo-Norman period, p. 29.). And this implies, apparently, the spuriousness of the continuation ascribed to Peter of Blois, in which the passage about Averroes throws doubt upon the whole. I have, in the

Introduction to the History of Literature, retracted the degree of credence here given to the foundation of the University of Oxford by Alfred. If Ingulfus is not genuine, we have no proof of its existence as a school of learning before the middle of the twelfth century.

225.

SCHOOLMEN.

Edit. 1826, vol. iii. p. 534. Edit. 1841, vol. ii. p. 486.

IT must be owned with regard to the schoolmen, as well as the jurists, that I have underrated, or at least not anticipated, the attention which their works have attracted in modern Europe, judging rather from the philosophy of the eighteenth century than of the present. For several years past, the metaphysicians of Germany and France have brushed the dust from the scholastic volumes; Tennemann and Buhle, Degerando, but more than all Cousin and Rémusat, in their excellent labours on Abelard, have restored the medival philosophy to a place in transcendental metaphysics, which, during the prevalence of the Cartesian school, and those derived from it, had been refused.

226.

FRENCH LANGUAGE.

Edit. 1826, vol. iii. p. 546. Edit. 1841, vol. ii. p. 496.

THE laws of William the Conqueror, published in Ingulfus, are translated from a Latin original; the French is of the thirteenth century. It is doubtful whether any French, except a fragment of a translation of Boethius, in verse, is now extant of an earlier age than the twelfth. (Introduction to Hist. of Literat. 3d edit. p. 28.)

227.

POETRY OF RICHARD I.

Edit. 1826, vol. iii. p. 549. Edit. 1840, vol. ii. p. 497.

RAYNOUARD published, in Provençal, the song of Richard on his captivity, which had several times appeared in French. It is not improbable that he wrote it in both dialects. (Leroux de Lincy, Chants Historiques Français, vol. i. p. 55.) Richard also composed verses in the Poitevin dialect, spoken at that time in Maine and Anjou, which resembles the langue d'Oc more than that of northern France, though, especially in the latter countries, it gave way not long afterwards. (Id. p. 77.)

228.

STORIES OF ARTHUR.

Edit. 1826, vol. iii. p. 550. note *. Edit. 1841, vol. ii. p. 497. note †.

THOUGH the stories of Arthur were not invented by the English out of jealousy of Charlemagne, it has been ingeniously conjectured and rendered highly probable by Mr. Sharon Turner, that the history by Geoffrey of Monmouth was composed with a political view to display the independence and dignity of the British crown, and was intended, consequently, as a counterpoise to that of Turpin, which never became popular in England. It is doubtful, in my judgment, whether Geoffrey borrowed so much from Armorican traditions as he pretended.

229.

PETRARCH.

Edit. 1826, vol. iii. p. 571. Edit. 1841, vol. ii. p. 511.

I RETRACT altogether the preference here given to the Triumphs above the Canzoni, and doubt whether the latter are superior to the Sonnets. This at least is not the opinion of Italian critics, who ought to be the most competent.

230.

LAYAMON.

Edit. 1826, vol. iii. p. 571. Edit. 1841, vol. ii. p. 512.

LAYAMON, as is now supposed, wrote in the reign of John. See Sir Frederic Madden's edition, and Mr. Wright's Biographia Literaria. The best reason seems to be that he speaks of Eleanor, queen of Henry, as then dead, which took place in 1204. But it requires a vast knowledge of the language to find a date by the use or disuse of particular forms; the idiom of one part of England not being similar to that of another in grammatical flexions. (See Quarterly Review for April, 1848.)

231.

ENGLISH IN PARLIAMENTARY PROCEEDINGS.

Edit. 1826, vol. iii. p. 575. Edit. 1841, vol. ii. p. 514.

THE progress of our language in proceedings of the legislature is so well described in the Preface to the authentic edition of Statutes of the Realm, published by the Record

Commission, that I shall transcribe the passage, which I copy from Mr. Cooper's useful account of the Public Records (vol. i. p. 189.):—

"The earliest instance recorded of the use of the English language in any parliamentary proceeding is in 36 Edw. III. The style of the roll of that year is in French as usual, but it is expressly stated that the causes of summoning the parliament were declared *en Englois;* and the like circumstance is noted in 37 and 38 Edw. III.* In the 5th year of Richard II., the chancellor is stated to have made *un bone collacion en Engleys* (introductory, as was then sometimes the usage, to the commencement of business), though he made use of the common French form for opening the parliament. A petition from the 'Folk of the Mercerye of London,' in the 10th year of the same reign, is in English; and it appears also that in the 17th year the Earl of Arundel asked pardon of the Duke of Lancaster by the award of the King and Lords, in their presence in parliament, in a form of English words. The cession and renunciation of the crown by Richard II. is stated to have been read before the estates of the realm and the people in Westminster Hall, first in Latin and afterwards in English, but it is entered on the parliament roll only in Latin. And the challenge of the crown by Henry IV., with his thanks after the allowance of his title, in the same assembly, are recorded in English, which is termed his maternal tongue. So also is the speech of Lord William Thyrning, the Chief Justice of the Common Pleas, to the late King Richard, announcing to him the sentence of his deposition, and the yielding up, on the part of the people, of their fealty and allegiance. In the 6th year of the reign of Henry IV. an English answer is given to a petition of the Commons, touching a proposed resumption of certain grants of the crown to the intent the king might live of his own. The English language afterwards appears occasionally, through the reigns of Henry IV. and Henry V. In the first and

* References are given to the Rolls of Parliament throughout this extract.

second, and subsequent years of Henry VI., the petitions or bills, and in many cases the answers also, on which the statutes were afterwards framed, are found frequently in English; but the statutes are entered on the roll in French or Latin. From the 23d year of Henry VI., these petitions or bills are almost universally in English, as is also sometimes the form of the royal assent; but the statutes continued to be enrolled in French or Latin. Sometimes Latin and French are used in the same statute *, as in 8 Hen. VI., 27 Hen. VI., and 39 Hen. VI. The last statute wholly in Latin on record is 33 Hen. VI. c. 2. The statutes of Edward IV. are entirely in French. The statutes of Richard III. are in many manuscripts in French in a complete statute form; and they were so printed in his reign and that of his successor. In the earlier English editions a translation was inserted in the same form; but in several editions, since 1618, they have been printed in English, in a different form, agreeing, so far as relates to the acts printed, with the inrolment in Chancery at the Chapel of the Rolls. The petitions and bills in parliament, during these two reigns are all in English. The statutes of Henry VII. have always, it is believed, been published in English; but there are manuscripts containing the statutes of the first two parliaments, in his first and third year, in French. From the fourth year to the end of his reign, and from thence to the present time, they are universally in English."

232.

QUOTATIONS IN THE DARK AGES.

Edit. 1826, vol. iii. p. 578. Edit. 1841, vol. ii. p. 516.

THIS is by much too strongly asserted; during the dark ages, that is from the sixth to the eleventh century, quota-

* All the acts passed in the same session are legally one statute; the difference of language was in separate chapters or acts.

tions from the Latin poets ought not to be called unusual. Virgil, Ovid, Statius, and Horace are brought forward by those who aspired to some literary reputation, especially during the better periods of that long twilight, the reigns of Charlemagne and his son in France, part of the tenth century in Germany, and the eleventh in both. The prose writers of Rome are not so familiar, but in quotations we are apt to find the poets preferred; and it is certain that a few could be named who were not ignorant of Cicero, Sallust, and Livy. Nor is it correct to say, without more limitation than I have employed, that the study of the poets was almost forbidden. This may have been true in particular instances; but the prohibition was never general, or at least never regarded. The subject is more accurately touched in the History of Literature, and in a former note on p. 331.

233.

INVENTION OF PAPER.

Edit. 1826, vol. iii. p. 580. Edit. 1841, vol. ii. p. 517.

SEE the Introduction of History of Literature, chap. i. sect. 58.

234.

GREEK LANGUAGE.

Edit. 1826, vol. iii. p. 586. Edit. 1841, vol. ii. p. 521.

SEE the same work, chap. ii. sect. 7.

THE END.

LONDON:
SPOTTISWOODE and SHAW,
New-street-Square.

00029967

Digitized with financial assistance from the
Government of Maharashtra
on 18 July, 2018